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No. 01-___

IN THE

Supreme Court of the United States

PHILLIP MULDER, GLENN HILTON, CHARLES BUCK, LEON GIBBONS, REBECCA MCREYNOLDS and BARBARA KIPP,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 2002

39 pages

QUESTIONS PRESENTED

In *Ellis v. BRAC*, 466 U.S. 435, 451-53 (1984), this Court held that labor unions governed by the Railway Labor Act may not require objecting nonmembers to pay compulsory dues for union "organizing" campaigns. In *CWA v. Beck*, 487 U.S. 735, 745 (1988), this Court compared the "union security" provisions of the Railway Labor Act and the National Labor Relations Act and held that they are "in all material respects identical."

I. May a labor union governed by the National Labor Relations Act require objecting nonmembers, as a condition of employment, to pay compulsory dues for union organizing campaigns?

II. If the National Labor Relations Act is properly construed to compel objecting nonmembers to fund union organizing campaigns as a condition of employment, is the statute unconstitutional as applied?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners below were Phillip Mulder, Leon Gibbons, Charles Buck, Glenn Hilton, Rebecca McReynolds and Barbara Kipp. United Food and Commercial Workers Local 1036 was a cross-petitioner.

The Respondent below was the National Labor Relations Board.

Intervenors below were United Food and Commercial Workers, Locals 7 and 951.

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IN THE

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PHILLIP MULDER, LEON GIBBONS, CHARLES BUCK, GLENN HILTON, REBECCA MCREYNOLDS AND BARBARA KIPP,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Phillip Mulder, Leon Gibbons, Charles Buck, Glenn Hilton, Rebecca McReynolds and Barbara Kipp respectfully pray that a writ of *certiorari* issue to review the *en banc* opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on March 25, 2002.

OPINIONS BELOW

The *en banc* March 25, 2002 opinion of the United States Court of Appeals for the Ninth Circuit, Appendix A ["App."] at 1a, is reported at 284 F.3d 1099. The September 14, 2001 Order of the United States Court of Appeals for the Ninth Circuit vacating the opinion of the original panel and ordering that the case be reheard *en banc*, App. B at 25a, is reported at

265 F.3d 1079. The August 2, 2001 Order of the panel finding that the petitions for rehearing *en banc* were timely filed, App. C at 27a, is unreported. The June 28, 2001 *sua sponte* Order of the panel requiring briefing on whether the case should be reheard *en banc*, App. D at 29a, is unreported. The May 17, 2001 decision of the original three-judge panel, App. E at 31a, is reported at 249 F.3d 1115. The September 30, 1999 Decision and Order of the National Labor Relations Board, App. F. at 40a, is reported at 329 N.L.R.B. 730. The January 31, 1997 Supplemental Decision of the Administrative Law Judge, App. G at 95a, is reported at 329 N.L.R.B. 747.

JURISDICTION

A three-judge panel of the Ninth Circuit issued its opinion on May 17, 2001. On June 28, 2001, the panel issued a *sua sponte* order requiring the parties to file briefs on whether the case should be reheard *en banc*. The NLRB and the intervening unions filed responses and formally petitioned that the case be reheard *en banc*. On August 2, 2001, the panel ruled that all petitions for rehearing *en banc* were timely filed. On September 14, 2001, the full court vacated the panel opinion and ordered the case reheard *en banc*. On March 25, 2002, the *en banc* court of appeals issued the opinion from which the writ of *certiorari* is being sought, and the time for filing this petition runs from that date. This petition is therefore timely filed under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1254(1) (West 2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* and the Railway Labor

Act, 45 U.S.C. § 151 *et seq.* It also involves the First, Fifth and Fourteenth Amendments to the United States Constitution. The pertinent texts are set forth in Appendices H at 137a and I at 138a.

STATEMENT OF THE CASE

Petitioners Philip Mulder, Charles Buck and Leon Gibbons ("Petitioners" or "Nonmembers") worked for Meijer, Inc. ("Meijer"), a regional food and general merchandise retail chain based in Grand Rapids, Michigan. Their collective bargaining agent was United Food and Commercial Workers Local 951 ("Local 951"), a union that represents employees in widely disparate bargaining units and industries, including retail grocery stores, mercantile stores, food processing factories, a nursing home, pet food processing factories and various distribution centers. The collective bargaining agreement between Local 951 and Meijer contained a clause requiring all employees to join the union or pay dues as a condition of continued employment.

At various times in 1988 and 1989, these three Nonmembers resigned from membership in Local 951 and objected, under *CWA v. Beck*, 487 U.S. 735 (1988), to the use of their compulsory dues for political and nonrepresentational activities. Local 951 provided them with financial disclosure about the union's expenditures. This disclosure showed that both Local 951 and its parent affiliate, United Food and Commercial Workers International ("UFCW"), spent significant portions of the dues and fees collected on "organizing" employees of employers besides Meijer. Local 951 included these organizing expenditures within the "chargeable" portion of the dues that the Nonmembers were required to pay under the compulsory unionism clause.

Petitioners Rebecca Kipp and Barbara McReynolds ("Petitioners" or "Nonmembers") worked for City Markets, Inc. ("City Markets"), a Colorado grocery retailer, at separate bargaining unit stores in the rural mountain towns of Glenwood Springs and Fruita, Colorado. Their collective bargaining agent was UFCW Local 7 ("Local 7"), a union that also represented employees of many other employers in the retail grocery and meat packing industries throughout Colorado and Wyoming. The collective bargaining agreement between Local 7 and City Markets also contained a clause requiring all employees to join the union or pay dues as a condition of continued employment.

In July 1989, Kipp and McReynolds resigned from membership in Local 7 and objected under *Beck* to the use of their compulsory dues for political and nonrepresentational activities. Local 7 provided them with financial disclosure which showed that the union spent significant portions of the compulsory dues on "organizing" employees of employers besides City Markets, and charged them for all of its organizing expenses.

Between 1988 and 1991, all of these Nonmembers, as well as other nonunion employees in different locations, filed dozens of separate unfair labor practice charges with the National Labor Relations Board ("NLRB") against various UFCW local unions, alleging numerous failures to comply with *Beck*. The major issue raised in these unfair labor practice charges was whether the UFCW local unions could require objecting nonmembers to subsidize union efforts to "organize," and recruit as members, employees of other employers.

On October 25, 1991, after investigating these unfair labor practice charges, the NLRB General Counsel issued a nationwide consolidated complaint against Locals 7, 951, and several other UFCW local unions. In part, the complaint alleged that Locals 7 and 951 violated the National Labor Relations Act

("NLRA") by charging objecting nonmembers for expenses incurred in organizing employees of other employers. In their answers and at trial, the unions admitted these facts.

On January 14, 1992, a nationwide trial commenced before an NLRB Administrative Law Judge ("ALJ"). The overriding issue at trial was the chargeability or nonchargeability of union organizing expenditures. The General Counsel and the Nonmembers took the position that all such expenditures are nonchargeable as a matter of law under *Ellis v. BRAC*, 466 U.S. 435 (1984), and *CWA v. Beck*, 487 U.S. 735 (1988). They objected to the admission of the unions' factual and expert testimony on organizing, believing this issue to be settled as a matter of law under *Ellis* and *Beck*. Despite these objections, the ALJ permitted the unions to introduce the testimony of two economists and several union officials, who testified to the notion that higher levels of unionization bring more success at the bargaining table.

In rebuttal, the General Counsel called Professor Morgan Reynolds, a labor economist from Texas A & M University, as an expert witness. Professor Reynolds testified that the relationship between the level of unionization and wages is "weak and tenuous," and that many other complex variables, including the general unemployment level, are much greater wage determinants.

On January 31, 1997, the ALJ issued a Supplemental Decision. App. G at 95a.[1] The ALJ did not make findings of

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[1] On March 7, 1995, the ALJ issued an initial decision dismissing the General Counsel's complaint in its entirety. This ruling was predicated on the fact that, seven years after this Court's decision in *Beck*, the NLRB still had not addressed nonmembers' right to refrain from supporting union political and other nonrepresentational activities. Shortly thereafter, the

(continued...)

fact or rule directly on the testimony of the various experts, recognizing the evidence about organizing to be conflicting. He stated:

> During the hearing, different experts testified in support of the opposing positions on this issue. It may well be that in different industries and in different geographic areas the extent of organization of the work force may or may not, in reality, support or refute the abstract proposition that wages, benefits and employment conditions of employees working for one employer are affected by those which prevail in the industry or area.

App. G at 131a.

Nevertheless, the ALJ held that objecting nonmembers could be required to pay for union organizing activities directed at employees of other employers. He reasoned that "organizing activities are a necessary incident of collective bargaining and contract administration." *Id.* at 132a. The ALJ did not find this Court's decision in *Ellis* to be binding, holding that "the Railway Labor Act and public sector precedent does not govern evaluation under the Act of union expenditures and of allocation concerning them." *Id.* at 129a.

The Nonmembers filed timely exceptions with the NLRB. On September 30, 1999, a divided NLRB affirmed the ALJ and held that objecting nonmembers can be required to financially support union organizing, "at least with respect to organizing

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[1](...continued)
NLRB decided *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), its first case interpreting *Beck*. On April 2, 1996, in an unpublished decision, the NLRB remanded this case to the ALJ for a supplemental decision in light of *California Saw*.

within the same competitive market as the bargaining unit employer." App. F at 53a. The NLRB majority refused to apply *Ellis*, believing that case to be specific to the Railway Labor Act ("RLA"), and distinguishable because, they asserted, the NLRA's principal purpose is to "foster organizing across employer lines." *Id.* at 64a. Member Brame dissented, finding that the majority's attempt to distinguish this Court's RLA and NLRA precedents is foreclosed by *Beck's* holding that § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), has the same meaning as § 2, Eleventh, of the RLA, 45 U.S.C. § 152, Eleventh. App. F at 79a, 84a-90a.

Timely Petitions for Review were filed in both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Ninth Circuit. On October 22, 1999, pursuant to 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation randomly selected the Ninth Circuit as the forum to consolidate these petitions for review.

On May 17, 2001, a three-judge panel of the Ninth Circuit unanimously reversed the NLRB.[2] 249 F.3d 1115, App. E at 31a. The panel held that the NLRB was bound by the holding of *Ellis,* 466 U.S. at 452, that union "organizational efforts were not what Congress aimed to enhance by authorizing the union shop," and by the holding of *Beck,* 487 U.S. at 745, that the provisions of the RLA and the NLRA authorizing "union-security" agreements are "in all material respects identical." Relying on *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992), the panel reasoned that the NLRB was owed no deference in this case, because "the Board does not have a free

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[2] Senior Judge Noonan wrote the opinion for the unanimous panel, which included Judges McKeown and Wardlaw. Judge Wardlaw issued a separate concurring opinion. App. E at 38a.

hand to interpret a statute when the Supreme Court has already interpreted the statute," and "does not have the power to reverse the Supreme Court." 249 F.3d at 1119-2000, App. E at 35a-37a.

On June 28, 2001, the same three-judge panel *sua sponte* issued an order requiring briefing on whether the case should be reheard *en banc*. App. D at 29a. The NLRB and the unions filed petitions for rehearing *en banc*, which were deemed by the panel to be timely filed. App. C at 27a. On September 14, 2001, the Ninth Circuit vacated the panel opinion and ordered the case reheard *en banc*. App. B at 25a.

In an opinion authored by Judge Stephen Reinhardt, the *en banc* Ninth Circuit panel unanimously upheld the NLRB majority's ruling that objecting nonmembers can be required to subsidize union organizing activities "within the same competitive market." 284 F.3d 1099 (2002), App. A at 1a.[3] According to Judge Reinhardt's opinion, *Ellis*' ruling that organizing is outside of Congress' authorization is limited solely to the RLA, and binds neither the NLRB nor the courts when applying the NLRA. App. A at 19a-22a.

As to *Beck*, Judge Reinhardt also found that decision narrow and limited. "We should first remove any question as to whether the *Beck* Court dealt with the question of *what* activities are germane to collective bargaining. It did not." App. A at 17a. Judge Reinhardt found nothing in *Beck* controlling on the organizing issue, because *Beck* did not itself hold that organizing is nonchargeable, instead leaving "to the [Fourth Circuit] Court of Appeals the ultimate resolution of the

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[3] Judge Wardlaw, who had issued a separate concurrence supporting the original panel opinion, reversed herself and this time agreed with the *en banc* opinion. *Compare* 249 F.3d at 1120-21, App. E at 38a, *with* 284 F.3d at 1102, App. A at 2a.

question of which specific expenditures were germane and therefore chargeable to nonmembers." App. A at 17a. What Judge Reinhardt did not mention, however, is that the *en banc* Fourth Circuit, which did resolve this question, held unanimously that organizing activities are nonchargeable under the NLRA, precisely *because* of *Ellis*' binding precedent. *Beck v. CWA*, 776 F.2d 1187, 1211-12 (1985), *aff'd en banc*, 800 F.2d 1280, 1282 (4th Cir.1986), *aff'd*, 487 U.S. 735 (1988).

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The *En Banc* Decision of the Ninth Circuit Is Directly Contrary to This Court's Decisions in *Ellis* and *Beck*, and This Court's Entire Body of Compulsory Dues Law.

A. Introduction. In *Ellis*, this Court held that labor unions governed by the RLA may not require objecting nonmembers to pay compulsory dues for union "organizing" campaigns. 466 U.S. at 451-53. In *Beck*, this Court compared the "union-security" provisions of the RLA and the NLRA and held that they "are in all material respects identical." 487 U.S. at 745.

Despite these holdings, the *en banc* Ninth Circuit vacated a unanimous decision of its own three-judge panel, App. E at 31a-39a, and found organizing to be a chargeable expense that NLRA-covered nonmembers must bear. Astonishingly, the *en banc* Ninth Circuit proclaimed that faithfulness to this Court *required* it to reject the authority of *Ellis* and *Beck*. "The Supreme Court has repeatedly admonished the lower courts against overreading its precedents, and we find that admonishment particularly applicable here." 284 F.3d at 1113, App. A at 22a.

The Nonmembers respectfully submit that the Ninth Circuit should concern itself not with "overreading" this Court's precedents, but rather with *reading* them. A fair reading of *Ellis* and *Beck* leads inescapably to the conclusion that Judge Reinhardt and the Ninth Circuit simply rejected this Court's precedents. *See, e.g., Department of Housing & Urban Dev. v. Rucker*, 535 U.S. ___, ___, 122 S. Ct. 1230, 1236 (2002) (reversing the Ninth Circuit, holding that "Congress has directly spoken on the precise question at issue"); *United States v. Arvizu*, 534 U.S. 266, ___, 122 S. Ct. 744, 747 (2002) (the approach taken by the Ninth Circuit "departs sharply" from this Court's teachings); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (per curium) ("To be sure, the Court of Appeals here recited [the proper] principles, but its application of them is nothing short of baffling"); *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) ("the Ninth Circuit's holding is in direct conflict with our precedents"); *Bennett v. Spear*, 520 U.S. 154, 176 (1997) ("It is difficult to understand how the Ninth Circuit could have failed to see this from our cases"); *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (Ninth Circuit "cited no authority" in reaching its conclusion); *Immigration & Naturalization Serv. v. Abudu*, 485 U.S. 94, 109 (1988) ("the reasoning of the Court of Appeals . . . is not supported by our cases, and has been consistently rejected by other Circuits and by other panels in the Ninth Circuit"). Intervention by this Court is needed to correct a serious abuse of the nation's primary labor law.

B. *Ellis* Could Not Be Clearer: All Union Organizing Is "Outside Congress' Authorization." In *Ellis v. BRAC*, 685 F.2d 1065 (9th Cir. 1982) (2-1 decision), *rev'd in pertinent part*, 466 U.S. 435 (1984), the Ninth Circuit found union organizing expenses chargeable to nonmembers covered by the RLA:

> [M]aximum organization of an industry benefits employees and units already organized. A union is considerably strengthened if it eliminates competition from non-union employers. . . . Successful organizing efforts thus can strengthen the union's position at the collective bargaining table immeasurably.

685 F.2d at 1074.[4]

This Court flatly rejected that proposition, unanimously overruling the Ninth Circuit: "Despite this attenuated connection with collective bargaining, . . . such expenditures are outside Congress' authorization." *Ellis*, 466 U.S. at 451. Notwithstanding this Court's unambiguous rejection of the Ninth Circuit's rationale under the RLA, the *en banc* Ninth Circuit has now resuscitated the identical proposition under the NLRA.

In *Ellis*, this Court identified three specific considerations for its holding that nonmembers need not support union organizing. The *en banc* Ninth Circuit either ignored these considerations or found them limited exclusively to the RLA based upon what it called *Ellis*' "close review" of that statute and its legislative history. App. A at 19a. However, the notion that *Ellis* is irrelevant under the NLRA is demonstrably false after *Beck* found RLA § 2, Eleventh and NLRA § 8(a)(3) to be "statutory equivalent[s]," with "identical" congressional purposes. *Beck*, 487 U.S. at 746-47. Indeed, the three factors cited in *Ellis* apply with equal vigor under the NLRA.

First, *Ellis* unequivocally rejected the argument that nonmembers could be required to contribute to the overall strength of the union because strong unions achieve greater

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[4] The Ninth Circuit majority opinion in *Ellis* was written by Circuit Judge Pregerson, one of the members of the *en banc* court below.

success at the bargaining table and across bargaining unit lines: The "notion that § 2, Eleventh would be a tool for the expansion of overall union power appears nowhere in the legislative history." *Ellis*, 466 U.S. at 451. Attempting to distinguish this holding, the *en banc* Ninth Circuit found that the NLRA is different from the RLA because "organizing is central to the purpose of the NLRA," and the failure to organize other employers "weakens the union's ability to bargain with the employer." App. A at 12a.

But the Ninth Circuit's notion of "strengthening union power" above all else is absent from any fair reading of the text or legislative history of § 8(a)(3) of the NLRA, just as *Ellis* found it absent from § 2, Eleventh of the RLA. While the NLRA (like the RLA) sets up a process by which unions may recruit willing employees as members, it does not give unions unfettered power to do so—with other people's money or property. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (limiting a UFCW union's organizing activity on private property, and holding that by "its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers"); *see also Pattern Makers League v. NLRB*, 473 U.S. 95, 101-05 (1985) (policy of the NLRA is employee free choice and "voluntary unionism," not compulsory membership).

In short, the NLRA is indistinguishable from the RLA on the precise issue presented here, contrary to the strained rationale of the *en banc* Ninth Circuit.

Second, *Ellis* held:

> where a union shop provision is in place and enforced, all employees *in the relevant unit* are already organized. By definition, therefore, organizing expenses are spent on employees outside the

> collective-bargaining unit already represented. Using dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer.

466 U.S. at 452 (footnote omitted & emphasis added). The *en banc* Ninth Circuit never directly addressed this critical point, or the fact that the NLRA, like the RLA, revolves around employees in "relevant bargaining units." *See generally* NLRA § 9(b), 29 U.S.C. § 159(b) (specifying that "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof," not *any* unit tenuously related to the original unit); *see also Pall Corp. v. NLRB*, 275 F.3d 116, 120 (D.C. Cir. 2002), *citing Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 294 (1959) (an issue arising outside the bargaining unit may be a mandatory subject of bargaining only if it "vitally affects" the terms and conditions of employment within the bargaining unit); *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971) (retirees' health benefits not a mandatory subject of bargaining because those individuals are outside the relevant unit).

Indeed, *Ellis* also applied the "relevant bargaining unit" analysis to determine whether other union expenses, besides organizing, were chargeable to nonmembers. For example, out-of-unit litigation expenses were held nonchargeable precisely because they do not relate to the nonmembers' specific unit.

> The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees. Contrary to the view of the Court of Appeals, therefore, unless the Western

> Airlines bargaining unit is directly concerned, objecting employees need not share the costs of the union's [litigation].

466 U.S. at 453.

Although the *en banc* Ninth Circuit failed to address *Ellis*' "relevant bargaining unit" analysis or apply its teachings, there is no reason to believe that this analysis arbitrarily changes from the RLA to the NLRA. *See Teamsters Local 443 (Connecticut Limousine Serv.)*, 324 N.L.R.B. 633, 639 (1997) (Chairman Gould, dissenting) (Board majority is "manufactur[ing] a distinction in applicable law where none exists").

Ellis holds that "it would be perverse to read [§ 2, Eleventh] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." 466 U.S. at 452 n.13. The same is true under the NLRA with regard to the unions' efforts to convince employees in other potential bargaining units to become union members. Since objecting nonmembers cannot lawfully be charged for member recruitment within *their own* bargaining unit—where the relationship to bargaining is obviously greatest—it necessarily follows that objecting nonmembers cannot be charged for member recruitment in *other* units, even "within the same competitive market." App. A at 14a, n.13.

Third, *Ellis* held:

> The free-rider rationale does not extend this far. The image of the smug, self-satisfied nonmember, stirring up resentment by enjoying benefits earned through other employees' time and money, is completely out of place when it comes to the union's overall organizing efforts. . . . [T]he free rider Congress had in mind was the employee the union was *required to represent and from whom it could not withhold benefits obtained for*

> *its members*. Non-bargaining unit organizing is not directed at that employee.

466 U.S. at 452 (emphasis added).

The *en banc* Ninth Circuit did not directly address this third *Ellis* factor either, but it applies equally to the NLRA. Local 951 owes no statutory obligation to Meijer employees in Michigan to organize and represent employees at other warehouses or food retailers, nor does Local 7 owe City Markets' employees in Glenwood Springs and Fruita, Colorado a statutory duty to organize other retailers, wholesalers, meatpackers or large general merchants like Macy's or Emporium. While Locals 7 and 951 may well have undertaken grand plans for the unionization of the entire nation—as is their right—they are under no statutory obligation to do so, and must pay for this activity from voluntary supporters. Nothing in *Beck* or the NLRA is to the contrary.

C. Based Upon Thirty Years of Precedent, *Beck* Holds That Congress' Authorization of Compulsory Dues Exactions Is "Identical" under the RLA and the NLRA. As if *Ellis,* standing alone, was not enough to raise grave questions about the propriety of the *en banc* Ninth Circuit's ruling and its lack of fealty to this Court's precedents, *Beck* slams the door on the lower court. Far from arising on a clean slate such that none of this Court's compulsory dues precedents control, *see* App. A at 14a to 23a, *Beck* explicitly applied *Ellis'* principles to the NLRA. Moreover, it did so against a backdrop of over thirty years of labor law and constitutional jurisprudence.

This Court did not act in a vacuum in *Beck* when it compared the legislative histories and congressional purpose underlying the two compulsory dues statutes, NLRA § 8(a)(3), and RLA §2, Eleventh, and found them to be "statutory equivalent[s]." *Beck*, 487 U.S. at 762.

> Our decision in *[Machinists v.] Street*, [367 U.S. 740 (1961)] is far more than merely instructive here: we believe it is *controlling*, for § 8(a)(3) and § 2, Eleventh are in all material respects *identical*. Indeed, we have previously described the two provisions as 'statutory equivalents', *Ellis v. Railway Clerks*, 466 U.S. 435, 452, n.13 (1984), and with good reason, because their nearly identical language reflects the fact that in both Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost. . . . In these circumstances, *we think it clear that Congress intended the same language to have the same meaning in both statutes*.

487 U.S. at 745-47 (citations & footnotes omitted, emphasis added). Despite the blinders of the *en banc* Ninth Circuit, there is nothing equivocal about *Beck*'s use of the words "identical" and "controlling" to describe *Ellis'* limitations on the extent and reach of the two compulsory dues statutes—limitations that include this Court's unanimous determination that it is "outside Congress' authorization" to charge objecting nonmembers for union campaigns to organize and recruit new members. 466 U.S. at 451-53.

The finding that Congress intended to achieve "identical" results in enacting the compulsory unionism provisions of the two major federal labor statutes is not anomalous. This Court has consistently sought to harmonize its agency fee jurisprudence. For example, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a constitutional case challenging Michigan's compulsory dues statute, this Court held that its prior RLA decisions in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961), were "controlling." 431 U.S. at 232.

Abood described its holdings in *Hanson* and *Street* as "reflect[ing] familiar doctrines in the federal labor laws." 431 U.S. at 220; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 554-55 (1991) (Scalia, J., concurring in pertinent part) (there "is good reason to treat [*Ellis* and other statutory cases] as merely reflecting the constitutional rule").

This thirty-year harmonization of precedent and analysis between RLA § 2, Eleventh and NLRA § 8(a)(3) has been consistently recognized by the lower courts, with the *en banc* Ninth Circuit's notable exception. For example, in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1002-04 (1970), *further proceedings*, 533 F.2d 1126, 1128 n.3 & 1131-32 (9th Cir. 1976), two Ninth Circuit panels held that this Court's RLA decisions in *Machinists v. Street*, 367 U.S. 740 (1961), and *BRAC v. Allen*, 373 U.S. 113 (1963), were "equally applicable" to the NLRA, and that "it is immaterial that the NLRA rather than the Railway Labor Act is involved in the present litigation."

Other circuits have ruled likewise. The United States Court of Appeals for the District of Columbia Circuit has repeatedly held that unions collecting compulsory fees under the NLRA must meet the standards of this Court's RLA and constitutional cases in order to satisfy the NLRA's "duty of fair representation." *Abrams v. CWA*, 59 F.3d 1373, 1379 (D.C. Cir. 1995) (citing "basic considerations of fairness" under *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986)); *Ferriso v. NLRB*, 125 F.3d 865, 867-70 (D.C. Cir. 1997); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); *see also Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1418-20 (D.C. Cir. 1997), *aff'd*, 523 U.S. 866 (1998). The Seventh Circuit has recognized that "[t]he germaneness guidance offered by the Court in *Ellis* has also been applied in private sector NLRA cases." *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1113 (7th Cir. 1996). *See*

also Shea v. Machinists, 154 F.3d 508, 511-16 (5th Cir. 1998) (recognizing the equivalency between § 8(a)(3) and § 2, Eleventh, and this Court's efforts to harmonize its compulsory dues decisions); *but see Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998) (questioning whether this Court's RLA and constitutional precedents apply under the NLRA).

In refusing to accept this "statutory equivalence," the *en banc* Ninth Circuit took refuge in this Court's statement that "parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes," *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686, n.23 (1981). App. A at 20a, n.19. But the *en banc* Ninth Circuit's reliance on that general proposition is of no avail here. *Beck* explicitly considered that identical point, *and distinguished it*, when it held that the RLA's compulsory dues precedents are "controlling" under the NLRA, because "§ 8(a)(3) and § 2, Eleventh are in all material respects identical." 487 U.S. at 745-46, & n.3.

In short, the *en banc* Ninth Circuit boldly, and erroneously, refused to follow this Court's longstanding harmonization of the RLA's and the NLRA's compulsory dues provisions. This Court's intervention is needed now to restore consistency among the lower courts.

D. The *En Banc* Ninth Circuit's Deference to the NLRB Also Conflicts with This Court's Precedents. The original three-judge panel granted no deference to the NLRB. Relying on *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), the panel held that deference was uncalled for because *Ellis* and *Beck* had already decided the issue, and "[t]he Board does not have the power to reverse the Supreme Court." App. E at 37a.

In contrast, the *en banc* Ninth Circuit relied upon *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to grant absolute deference to the NLRB. Notwithstanding *Ellis*' holding that nonmembers cannot be forced to pay for union organizing, and *Beck*'s finding of statutory equivalence between the RLA and the NLRA, the *en banc* court reasoned that "the NLRB remains free to determine what union activities are germane to collective bargaining in industries covered by the NLRA," App. A at 17a. The *en banc* court found it significant that *Ellis* was decided by the judiciary in the absence of an administrative agency, whereas "Congress established entirely different procedures for the interpretation of each Act" when it created the NLRB, thus "militat[ing] strongly" against applying RLA law to the NLRA, even to identical issues. *Id.*

By exalting the NLRB's views above this Court's definitive statutory interpretations in *Ellis* and *Beck*, the *en banc* Ninth Circuit ignored this critical portion of *Chevron*: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. at 843 n.9. Because any coherent reading of *Ellis* and *Beck* shows that this Court has already determined the clear meaning of RLA § 2, Eleventh and NLRA § 8(a)(3) on the issue presented, review of the NLRB's decision must be based upon *stare decisis* and fealty to this Court, *Lechmere*, 502 U.S. at 536-37, not deference to a divided administrative agency which "manufacture[s] a distinction in applicable law where none exists," *Teamsters Local 443 (Connecticut Limousine Serv.)*, 324 N.L.R.B. 633, 639 (1997) (Chairman Gould, dissenting).

None of this Court's compulsory dues cases—including *Ellis* or *Beck*—originated with the NLRB. It is too late in the

day for the *en banc* Ninth Circuit suddenly to determine that the NLRB can arrogate to itself all "expertise" over this area of the law, including portions already decided by this Court as a matter of statutory interpretation and congressional intent. The *en banc* Ninth Circuit's erroneous deferral shows that review by this Court is necessary to clarify the respective roles of the NLRB and the judiciary in determining the rights of objecting nonmembers forced to pay compulsory union dues. *Compare Vaca v. Sipes*, 386 U.S. 171, 180-83 (1967) (NLRB's "tardy assumption of jurisdiction in [duty of fair representation] cases" does not "oust the courts of their traditional jurisdiction"), and *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-75 (1989) (expressing doubts as to whether "'the Board brings substantially greater expertise to bear on these problems than do the courts'" (*citing Vaca*, 386 U.S. at 181)) *with Machinists v. NLRB,* 133 F.3d 1012, 1015 (7th Cir. 1998), *cert. denied,* 525 U.S. 813 (1998) ("It is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting . . . the generalities of . . . *Beck* . . . into a workable system for determining and collecting agency fees"), and *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997) (overruling the NLRB, but nevertheless holding that it is entitled to *Chevron* deference when applying *Beck*).

In short, the divergent views of the original three-judge panel, the *en banc* Ninth Circuit, and other circuits about the level of deference owed to the NLRB when applying *Ellis* and *Beck,* show that intervention by this Court is necessary.

II. There Is a Direct Conflict Among the Circuit Courts on the Precise Issue Presented. There Is Also Uniformity of Federal and State Court Precedent in Opposition to the Ninth Circuit's Analysis.

A. The Courts of Appeals' Conflict. The *en banc* decision of the Ninth Circuit is in direct conflict with an *en banc* decision of the Fourth Circuit in *Beck v. CWA*, 776 F.2d 1187, 1211-12 (1985), *aff'd en banc*, 800 F.2d 1280, 1282 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988).

In *Beck*, a panel of the Fourth Circuit relied exclusively on *Ellis* to hold organizing nonchargeable under the NLRA. 776 F.2d at 1211-12. When the case was reheard *en banc*, the Fourth Circuit divided 6-4 on the appropriate basis for federal court jurisdiction over the objecting nonmembers' claims. However, the *per curium en banc* opinion stated, with regard to the panel's decision on organizing and other chargeability issues, that there was "no difference within the Court, assuming that federal jurisdiction was upheld, that the majority panel opinion's disposition of the allocation issue was properly resolved." 800 F.2d at 1282. This Court is thus faced with two unanimous, but conflicting, *en banc* opinions concerning *Ellis'* application to the NLRA, and the chargeability of union organizing under that statute. Intervention by this Court is clearly warranted.

B. The Uniform State and Federal Precedents. The *en banc* Ninth Circuit's decision is unprecedented under any state or federal labor statute. It is the first and *only* decision, of *any* federal or state court, to require objecting nonmembers to pay for union organizing as a condition of employment. *See, e.g., Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 696 (6th Cir. 1996) (organizing nonchargeable under the First Amendment); *Reese v. City of Columbus*, 798 F. Supp. 463, 470 (S.D. Ohio 1992) (same); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp.

1306, 1324-25 (W.D. Mich. 1986) (same), *aff'd*, 881 F.2d 1388 (6th Cir. 1989), *aff'd in part, rev'd in part on other grounds*, 500 U.S. 507 (1991); *Cumero v. Public Employment Rel'ns Bd.*, 262 Cal. Rptr. 46, 61-63, 778 P.2d 174, 189-91 (Cal. 1989) (organizing nonchargeable under state public-sector statute); *Breaux v. Agricultural Labor Rel'ns Bd.*, 265 Cal. Rptr. 904, 917 (Cal. Ct. App. 1990) (organizing nonchargeable under state agricultural labor statute); *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 668-70 (Ind. App. 1992), *aff'd sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992) (organizing nonchargeable under state public-sector statute); *Browne v. Wisconsin Employment Rel'ns Comm'n*, 485 N.W.2d 376, 388-89 (Wis. 1992) (same); *Illinois Fed'n of Teachers v. Illinois Educ. Labor Rel'ns Bd.*, 664 N.E.2d 107, 107-09 (Ill. Ct. App. 1996) (organizing nonchargeable under state public-sector statute, despite union official's testimony that "organizing benefits unit members by increasing the local union's strength in negotiations"). Although these courts were applying statutes other than the NLRA, their reasoning, based upon *Ellis* and *Lehnert*, directly conflicts with Judge Reinhardt's opinion for the *en banc* Ninth Circuit.

In short, the rule adopted *en banc* by the Ninth Circuit has been rejected by every federal and state court that has considered the issue or its equivalent. Intervention by this Court is clearly warranted.

III. It Is Important That the Court Grant the Writ Because the *En Banc* Decision of the Ninth Circuit Affects Millions of American Workers and Upsets Well-Established Precedent and Legal Certainty.

The issue presented is important for several reasons, not the least of which is the conflicting *en banc* decisions of the Fourth and Ninth Circuits. As noted, the Ninth Circuit's *en banc*

decision upsets what has heretofore been complete uniformity of court precedents. Thus, confusion among the lower courts is now guaranteed.

Moreover, absent this Court's intervention, the NLRB General Counsel will undoubtedly cease issuing complaints challenging the chargeability of union organizing, and the Ninth Circuit's decision will be virtually unreviewable. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987). Unions and nonmembers will be hereafter consigned to years of additional federal court litigation challenging the chargeability of union organizing expenditures under the duty of fair representation. *See Beck*, 487 U.S. at 742-44. In the meantime, millions of private-sector workers subject to compulsory dues clauses under the NLRA will be forced to subsidize union organizing and membership recruitment campaigns, while workers under the RLA will not. Not only will the affected employees suffer from this legal uncertainty, but the many unions which operate under both the NLRA and the RLA will face conflicting obligations as well.

IV. If the NLRA Requires Nonmembers to Subsidize Union Organizing, the Statute Is Unconstitutional as Applied.

In *Beck*, the nonmember employees raised a constitutional challenge to the expenditure of their compulsory dues for non-bargaining purposes. This Court did not decide the issue: "We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action." 487 U.S. at 761-62. The Nonmembers here have raised the identical issue, although the *en banc* Ninth Circuit brushed it aside. App. A at 9a-11a & n.11; 16a-17a & n.16. If this Court does not reverse the Ninth Circuit's statutory ruling, it should hold the NLRA unconstitutional as applied.

"State action" is present under the "exclusive representation" regime of the NLRA. While employers are not directly compelled to agree to a compulsory dues clause, the NLRA provides significant governmental pressure for them to do so, because such clauses are mandatory subjects of bargaining. Sections 8(a)(5), (d) and 9(a) of the NLRA, 29 U.S.C. §§ 158(a)(5), (d) and 159(a). Moreover, this governmental pressure to agree to some form of compulsory dues clause is applied by both the NLRB and the federal courts. *See NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *see also Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 409 (9th Cir. 1977); *NLRB v. Andrew Jergens Co.*, 175 F.2d 130 (9th Cir. 1949).

The lower courts are divided on whether this direct governmental involvement supports a finding of state action. *Compare Seay v. McDonnell-Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16-18 (1st Cir. 1971) ("'[t]he federal statute is the source of the power and authority by which any private rights are lost or sacrificed'" (*citing Hanson*, 351 U.S. at 232)); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1420 (D.C. Cir. 1997) ("it is not apparent why it is any less 'state action'" under the NLRA than under the RLA) *with Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983); and *Price v. International Union, United Auto., Aerospace & Agric. Implement Workers of America*, 927 F.2d 88, 91-92 (2d Cir. 1991); *see also* Topol, *Union Shops, State Action and the National Labor Relations Act*, 101 Yale L.J. 1135 (1992); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, . . . raise[s] grave constitutional problems"). Intervention by this

Court is needed to resolve this confusion among the circuit courts.

Moreover, the Nonmembers' constitutional claims are substantial. "Organizing" is, at its heart, advocacy of an ideological commitment to unionism, and the marketing of the particular union to other, nonrepresented employees. In an organizing campaign, employees do not speak with one voice and are not of one mind, just as "worker and union cannot be said to speak with one voice" in political and legislative fora. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991). The NLRB's own statistics show that unions are defeated in more than half of their attempts to attain representation of employees. App. F at 89a, n.25.

As this Court has long recognized, "[t]he right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945); *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Unquestionably, union efforts to recruit new members are infused with politics and ideology. Professor Paula Voos, a labor economist who testified at trial for the UFCW unions, admitted that unions organize for a whole host of reasons, often having nothing to do with raising the wage levels of any employees. These reasons include: the desire of union leaders for political aggrandizement and power, both on the local, state and national levels, and within the union movement itself; the monetary self-interest of union leaders to keep and enhance their own jobs and wages; and the perceived "social idealism" and "ideological gains" brought about by union organizing. Voos, *Union Organizing: Costs and Benefits*, 36 Indus. & Lab. Rels. Rev. 576, 577-78 (July 1983). Forcing

nonmembers to subsidize this activity violates the First Amendment. *See, e.g., Lehnert*, 500 U.S. at 520-22, 528-29.

CONCLUSION

The rule of law announced by the *en banc* Ninth Circuit conflicts directly with this Court's decisions, the decision of the *en banc* Fourth Circuit, and every lower court to consider similar issues. The Petition should be granted, and the decision below summarily reversed; or the case should be set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-___

IN THE

Supreme Court of the United States

PHILLIP MULDER, GLENN HILTON, CHARLES BUCK, LEON GIBBONS, REBECCA MCREYNOLDS and BARBARA KIPP,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

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June 2002

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APPENDIX A

DECISION OF THE *EN BANC* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

March 25, 2002

[284 F.3d 1099]

UNITED FOOD AND COMMERCIAL WORKERS UNION, Local 1036, Petitioner,

Phillip Mulder; Charles Buck; Leon Gibbons; United Food and Commercial Workers Union, Local 7; United Food and Commercial Workers Union, Local 951, Intervenors,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

Glenn Hilton; United Food and Commercial Workers Union, Local 951, Respondent-Intervenor.

Phillip Mulder; Glenn Hilton; Charles Buck; Leon Gibbons, Petitioners,

United Food and Commercial Workers Union, Local 7; United Food and Commercial Workers Union, Local 951, Intervenors,

v.

National Labor Relations Board, Respondent,

Rebecca McReynolds; Barbara Kipp, Petitioners,

United Food and Commercial Workers Union, Local 7; United Food and Commercial Workers Union, Local 951, Intervenors,

v.

National Labor Relations Board, Respondent.

National Labor Relations Board, Petitioner,

United Food and Commercial Workers Union, Local 7; United Food and Commercial Workers Union, Local 951, Intervenors,

v.

United Food and Commercial Workers Union, Local 1036, Respondent.

Nos. 99-71317, 99-71442, 99-71596 and 00-70156.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 11, 2001.
Filed March 25, 2002.

* * * *

[1102]Before: SCHROEDER, Chief Judge, PREGERSON, REINHARDT, KOZINSKI, T.G. NELSON, TASHIMA, THOMAS, SILVERMAN, WARDLAW, W. FLETCHER and FISHER, Circuit Judges.

REINHARDT, Circuit Judge.

The National Labor Relations Act ("NLRA" or "the Act"), as amended, es-**[1103]**tablishes an elaborate and complicated structure that governs labor relations in almost all of the industries within the nations private sector.[1] Collective bargaining is the central concern of that structure, and labor unions are essential to the collective bargaining process. The Act contains a union security provision, § 8(a)(3), that helps secure the role of unions in the collective bargaining process by permitting unions and employers to enter into agreements requiring employees to

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[1]The National Labor Relations Act was enacted in 1935 and significantly amended in 1947, in a series of amendments collectively entitled the Labor Management Relations Act of 1947. 29 U.S.C. §§ 151 et seq. The railroad industry is covered separately by the Railway Labor Act ("RLA") enacted in 1926. 46 U.S.C. §§ 151-188. The RLA was amended in 1936 to cover airlines.

become union members.[2] It is the interpretation of that provision that is at issue in this case.

The union intervenors, United Food and Commercial Workers Union Locals 7 and 951, serve as the exclusive bargaining representatives for the employees of several retail food companies. Collective bargaining agreements ("CBAs") negotiated between the employers and the unions govern the terms and conditions of the employees' employment. The National Labor Relations Act, as amended, requires that an exclusive bargaining representative must represent all employees in a bargaining unit — union members and non-members alike — when bargaining for wages, benefits, and working conditions, and when resolving grievances with the employer.[3] 29 U.S.C. §

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[2]Section 8(a)(3) permits an employer and a union to enter into an agreement which "require[s] as a condition of employment membership [in the union] on or after the thirtieth day following the beginning of such employment."

[3]Under the NLRA, union representation is conducted on a bargaining unit basis; a bargaining unit is "a grouping of two or more employees aggregated for the assertion of organizational rights or for collective bargaining." 1 Patrick Hardin, *The Developing Labor Law* 448 (1992). If the employees in a given workplace make a sufficient showing of interest, the NLRB will determine the boundaries of the appropriate bargaining unit and conduct an election amongst the employees in the unit to determine whether the union shall serve as the unit's exclusive bargaining representative (or, if more than one union wishes to do so, which union). Although the statute does not specify how the composition of an appropriate bargaining unit shall be determined—the bargaining unit is simply referred to as "a unit appropriate for such purposes [i.e., collective bargaining]"—the NLRB has developed a body of case law on the subject. 29 U.S.C. § 159(a). The NLRB examines a number of factors, all revolving around whether the employees in the proposed bargaining unit share a "community of interests." Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace For Labor And Employment Law*, 48 UCLA L.Rev. 519, 621-24 (2001). Those factors include "(1) extent and type of union organization of

158(b)(2)-(3). The NLRA also permits the exclusive bargaining representative and the employer to require that all employees become dues-paying "members" of the union. NLRA § 8(a)(3). Thus all persons in the bargaining unit receive the **[1104]**benefits and share the economic costs of union representation. Were "free riders" able to obtain the full benefits of the union's efforts without paying their share of the costs, union membership would likely be drastically reduced and the collective bargaining system seriously undermined. *Communications Workers of America v. Beck,* 487 U.S. 735, 743, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988).

The Supreme Court held, in *NLRB v. General Motors,* 373 U.S. 734, 743, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963), that § 8(a)(3)'s "membership" requirement can be satisfied simply by the payment of the requisite dues.[4] Thus, employees under a "union shop" arrangement who are required by contract to become union members, may be subjected to only one membership requirement—the payment of dues—and employees under an "agency shop" arrangement who are required by contract only

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employees; (2) bargaining history of the industry, as well as with respect to the parties before the Board; (3) similarity of duties, skills, interests and working conditions of the employees; (4) organizational structure of the company; and (5) the desires of the employees." 1 Hardin, *supra,* at 449. Because of the multiplicity of factors, a number of bargaining units may exist at a single employer's plant or store, or one bargaining unit may exist across various employers. *See* 1 Hardin, *supra,* at 462-72, 508-21(discussing various types of unit classifications and multi-employer units). We should also note that an NLRB election is not a prerequisite to an employer's recognition of a union or its agreement to a CBA. All that is required is that the majority of the employees in the unit desire to be represented by the union and that the unit for bargaining be "appropriate."

[4]Section 8(a)(3) describes the required dues as "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

to pay dues need not become union members even in form. *See Marquez v. Screen Actors Guild,* 525 U.S. 33, 46, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998) (explaining that in light of *General Motors* and *Beck,* "the statutory language [of § 8(a)(3)] incorporates an employee's right not to 'join' the union (except by paying fees and dues)"). Therefore, there is no realistic difference from a legal standpoint between a union shop and an agency shop, although under a union shop the union may, if it wishes, place an employee who only pays dues on its "membership" rolls. *General Motors,* 373 U.S. at 743-44, 83 S.Ct. 1453. There are, however, certain limitations on the costs that members in name only—or nonmembers[5]—can be compelled to bear by way of dues.[6] The Supreme Court held in *Communications Workers of America v. Beck,* 487 U.S. at 762-63, 108 S.Ct. 2641, that nonmembers need pay "only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" (quoting *Ellis v. Brotherhood of Railway, Airline and*

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[5]The terms "dues-paying nonmembers," "financial core members," "objecting nonmembers," and "nonmembers," are used interchangeably in the case law to refer to employees who pay only the required dues or the "agency fees," regardless of whether the employees are subject to a union shop or an agency shop provision. In this case, while we use the term "nonmembers," throughout our opinion, our analysis and decision are equally applicable to employees in both agency shops and union shops. We note that the nonmembers in this case "resigned" from the union, asserting their rights under *Beck* and *General Motors. United Food and Commercial Workers,* 329 NLRB No. 69, 162 L.R.R.M. (BNA) 1177, 1999 WL 818607, at *1-* 2 (Sep. 30, 1999). Because they were employed under a union shop arrangement, Local 7 chose to treat its former members as "financial core members." *Id.* Local 951 accepted the resignations of its members and treated them as nonmembers. *Id.* The Board, in its decision, refers to both groups of employees as "nonmembers," and for that reason, we do also.

[6]The term "dues", as used throughout our opinion, includes all payments required of the nonmembers, including "fees" and "assessments."

Steamship Clerks, 466 U.S. 435, 448, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)). The *Beck* Court further characterized 'necessary duties' as those functions that are "*germane* to collective bargaining, contract administration or grievance adjustment." 487 U.S. at 745, 108 S.Ct. 2641 (emphasis added). The issue to be decided in this case is whether or not Locals 7 and 951 violated the *Beck* rule by compelling nonmembers to pay their share of the costs of organizing their **[1105]**employers' competitors or, conversely, whether unions are permitted under the NLRA to charge nonmembers for the costs of such organizing activities. In short, is the function of organizing other employers in a competitive market germane to collective bargaining with the nonmembers' employer?

The individual petitioners in this matter are nonmembers of Locals 7 and 951, which serve as their exclusive bargaining representatives, and are employed by various employers in the retail food industry.[7] They filed charges with the National Labor Relations Board ("NLRB") contending that it was an unfair labor practice for the unions to use their dues to pay for the costs of organizing. The Board dismissed the charges, relying on its decision in *California Saw and Knife Works,* 320 NLRB No. 224, 1995 WL 791959 (1995), the first case in which it was called upon to apply *Beck.* In *California Saw,* the Board held that nonmembers' dues may be used for a union's activities outside the nonmembers' bargaining unit, but only if those activities are "germane to the union's role in collective-bargaining, contract administration and grievance adjust-

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[7]Mulder, Buck and Gibbons were employees of Meijer, Inc. in Michigan, for which Local 951 serves as the exclusive bargaining representative. McReynolds was an employee of City Markets in Glenwood Springs, Colorado, for which Local 7 serves as the exclusive bargaining representative. Kipp was an employee of City Markets in Fruita, Colorado, for which Local 7 serves as the exclusive bargaining representative. 329 NLRB No. 69, 1999 WL 818607, at *1-*2.

ment."[8] In the present case, the Board determined, after extensive factfinding, that "at least with respect to organizing within the same competitive market as the bargaining unit employer," organizing *is* germane to collective bargaining, and concluded that "[such] organizing expenses are chargeable to bargaining unit employees under the *California Saw* standard." *United Food and Commercial Workers,* 329 NLRB No. 69, 162 L.R.R.M. (BNA) 1177, 1999 WL 818607, at *6 (Sep. 30, 1999). The Board seeks enforcement of its order dismissing the petitioners' unfair labor practice charge, while the nonmembers seek review and ask us to vacate the order.

We have jurisdiction over the respective petitions under §§ 10(e) and 10(f) of the NLRA, 29 U.S.C. §§ 160(e)-(f). A panel of this court declined to enforce the Board's order, and granted the relief sought by the nonmembers, concluding that it was compelled to do so by *Beck* and *Ellis.*[9] *United Food and Commercial Workers Union v. NLRB,* 249 F.3d 1115(9th Cir.2001). The court conve ed *en banc* to reconsider the matter.

We now enforce the order of the Board and hold that, under § 8(a)(3) of the NLRA, a union serving as a bargaining unit's exclusive bargaining representative is permitted to charge all employees, members and nonmembers alike, the costs involved in organizing, at least when organizing employers within the same competitive market as the bargaining unit employer.

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[8]The NLRB's decision was upheld by the Seventh Circuit which enforced the Board's order. *International Association of Machinists & Aerospace Workers v. NLRB,* 133 F.3d 1012 (7th Cir.1998), *cert. denied,* 525 U.S. 813, 119 S.Ct. 47, 142 L.Ed.2d 36 (1998).

[9]*Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

I. Courts Are Required to Give Substantial Deference to the NLRB

The NLRB is one of the defining features of the NLRA's statutory scheme. **[1106]**Courts are required to defer to the NLRB on statutory interpretation under *Chevron,* and the deference to be accorded to the NLRB in its decisions on questions of fact and policy determinations is well settled. Moreover, under the NLRA, the Board has primary jurisdiction over claims of unfair labor practices, and the claim made by the petitioners—of improper assessment and use of union dues—constitutes an unfair labor practice claim under § 8(a)(3). *Beck,* 487 U.S. at 742, 743, 108 S.Ct. 2641 (discussing the primary jurisdiction of the Board over unfair labor practice claims); *see also Lechmere, Inc. v. NLRB,* 502 U.S. 527, 536, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992) ("It is certainly true, and we have long recognized, that the Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life.'").

The *Chevron* doctrine requires that this court defer to the NLRB's interpretation of the NLRA if its interpretation is rational and consistent with the statute. *NLRB v. United Food and Commercial Workers Union,* 484 U.S. 112, 123, 108 S.Ct. 413, 98 L.Ed.2d 429 (1987) (citing *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Where the statute is ambiguous, *Chevron* dictates that "a court may not substitute its own construction of [the] statutory provision for a reasonable interpretation made by . . . an agency." *Chevron,* 467 U.S. at 843-844, 104 S.Ct. 2778. Courts may only ignore the views of the agency where the intent of Congress is clear on the face of the statute. *Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778. Here, the only statutory provision that governs the dues that nonmembers may be required to pay is § 8(a)(3). That section, however, does not describe what types of expenditures may or may not be

made from those dues. Thus, for *Chevron* purposes, it is ambiguous.

The nonmembers assert that the Board is owed no special deference in the case before us in light of *Seay v. McDonnell Douglas,* 427 F.2d 996 (9th Cir.1970), *further proceedings,* 533 F.2d 1126 (9th Cir.1976). In *Seay,* we stated:

> [t]he policy behind the pre-emption doctrine is not served by deferring to the Board *where a constitutional question is validly presented.* The Board's special expertise in labor controversies does not extend to the interpretation of the Constitution. That field has traditionally been reserved to the courts.

427 F.2d at 1002-1003 (emphasis added). The *Seay* nonmembers asserted a substantial First Amendment claim: They contended that their dues "were used in substantial amounts for political and ideological purposes contrary to [their] wishes and in derogation of their constitutional rights under the First, Fifth and Ninth Amendments." 427 F.2d at 999. *Seay* was part of a line of cases resolving First Amendment claims made by nonmembers whose unions used their dues for political purposes, such as contributing to political candidates, engaging in political speech, and supporting or opposing legislation. The cases primarily arise in the public sector context or under the RLA. The guiding principle of the line of cases is that in order to protect the First Amendment rights of nonmembers, their dues may not be used for political purposes.[10] **[1107]***Seay* applied this

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[10]*See Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (holding that, in the public employment context, unions are not permitted to spend nonmembers' dues on political activities); *Brotherhood of Railway Clerks v. Allen,* 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963) (holding that, under the RLA, unions are not permitted to spend nonmembers' dues on political activities); *International Association*

principle in the context of the NLRA. Because the issue in the case before us does not involve any claim (let alone a substantial claim) regarding First Amendment rights, but rather the question of whether organizing an employer's competitors is germane to collective bargaining, the statement in *Seay* on which the nonmembers rely in no way affects our obligation to defer to the Board.

The nonmembers also cite *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 809 (9th Cir.1991), in which we stated that the Supreme Court, in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), "establishe[d] 'constitutional requirements for the Union's collection of agency fees.' "The nonmembers erroneously read our statement to mean that any charge that a nonmembers' dues are being used for activities that are not germane to collective bargaining requires interpretation of the Constitution. Neither *Dean* nor *Hudson* stands for any such proposition. Both cases involved the question of the *procedures* a union is required to establish in order to implement the guarantee that nonmembers' dues will not be used in a manner that violates their First Amendment rights. Although we stated in *Dean* that it was a constitutional violation for the union to collect dues *without adhering to Hudson's* procedural requirements, we did not proceed beyond that procedural ruling and suggest that it would be a violation of the Constitution for a union to use dues for non-political activities that are not germane to collective

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of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (same).

bargaining. Nor, of course, did *Hudson*.[11] 475 U.S. at 294, 106 S.Ct. 1066.

Where the claim made by nonmembers does not involve unions' use of dues for political purposes, but only raises the question whether the challenged union activities are germane to collective bargaining, we defer to the Board. The germane versus non-germane issue requires an informed assessment of the practical relationship between the challenged activity and the bargaining process. The Supreme Court has "not hesitated to defer to the Board's interpretation of the Act in the context of issues" that "implicate[ ] its expertise in labor relations." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829-30 n. 7, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984). *See Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-501, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978) (stating that the Board is entitled to deference because it is "expert in federal national labor relations policy"). The issue before us requires the very expertise the Court emphasized in *City Disposal Systems* and *Beth Israel Hospital*. Accordingly, we do not hesitate to defer to the Board's determination here.

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[11]Because the Supreme Court in *Hudson* sought to protect the constitutional rights of nonmembers not to have their dues used for political purposes, it established "constitutional" procedural requirements governing the collection of dues. *Hudson* requires "an adequate explanation of the basis for the [dues], a reasonably prompt opportunity to challenge the amount of the [dues] before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310, 106 S.Ct. 1066. From a practical standpoint, a single set of procedures is necessary for the implementation of the guarantee that nonmembers will have a right to challenge the unions' uses of their dues. Accordingly, the *Hudson* procedures are applicable to the collection of dues generally, and no distinction is made between expenditures that violate First Amendment rights and expenditures that are simply non-germane.

[1108]II. The Board's Decision that Organizing Is Germane to Collective Bargaining Is Correct and Is Entitled to Deference

Not only do the nonmembers fail substantially to contest the Board's actual factfinding in this case, but the Board's determinations are fully consistent with the realities of collective bargaining. Organizing is central to the purpose of the NLRA. It is a necessary first step to collective bargaining because without organizing, there can be no majority of union member employees who may lawfully insist that an employer bargain collectively. Because the union can only become the collective bargaining representative if enough employees agree, the initial recruitment and incorporation of new members into a nascent bargaining unit through organizing is crucial.

The specific question here involves organizing outside the nonmembers' bargaining unit, in particular the employees of competing employers. Such organizing may be crucial to improving the wages, benefits, and working conditions of employees in the bargaining unit. Organizing outside the bargaining unit, when successful, "eliminat[es] the competition of employers and employees based on labor conditions regarded as substandard." *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 503, 60 S.Ct. 982, 84 L.Ed. 1311 (1940). The fact that an employer's competitors are not unionized, and likely pay lower wages and provide lesser benefits, significantly weakens the union's ability to bargain with the employer, and decreases the union's prospects of achieving the economic objectives of the members of the bargaining unit.[12]

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[12]Members of Congress enacting § 8(a)(3) in 1947 vigorously (and successfully) opposed a proposal prohibiting a union from serving as the exclusive bargaining representative for competing employers precisely because union organizing of competing employers "protects wage standards from being undercut by lower-wage areas and lower-wage employers." 2

The NLRB's conclusion in this case that extra-bargaining unit organizing is germane to collective bargaining and a proper use of nonmembers' dues was supported by extensive economic research and data on organizing and collective bargaining in general, as well as with respect to the retail food industry. Expert testimony by several witnesses established that generally economists have found "a positive relationship between the extent of unionization of employees in an industry or locality and negotiated wage rates." 329 NLRB No. 69, 1999 WL 818607, at *7. Numerous studies by economists and labor scholars also documented a significant positive relationship between the rate of unionization and the negotiated wage rates in several union shop industries in the retail food area. Case studies of specific retail food geographic markets also confirmed the results of the statistical studies. 329 NLRB No. 69, 1999 WL 818607, at *7 - *9. The NLRB's findings reveal that management is far more willing to negotiate higher wage rates when its competitors are subject to the same union costs. 329 NLRB No. 69, 1999 WL 818607, at *7. Conversely, management is comparatively unwilling to yield to union demands when its competitors are not subject to similar obligations and costs.

It is in recognition of these facts that the NLRB found that, for NLRA industries, organizing within the competitive market is germane to collective bargaining. Accordingly, the NLRB concluded**[1109]**that under the "necessary" or "germane" to collective bargaining standard of *Beck*, nonmembers may be compelled to bear their fair share of the costs of organizing. The Board's conclusions are not only reasonable and supported by

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NLRB, *Legislative History of the Labor Management Relations Act, 1947,* at 1039 (Sen.Murray). Similarly, they argued, "employees must make their combination extend beyond one shop" because otherwise "organized workers would . . . be required to conform to the standard of the lowest paid, unorganized workers." 1 *Id.* at 680 (Rep.Price).

substantial evidence, for which reasons alone we must adopt them, but they are completely in accord with the economic realities of collective bargaining, as well as with the language and purposes of the NLRA.[13]

III. Beck Does Not Bar the NLRB from Determining Which Expenses are Chargeable to Nonmembers, Including Expenses of Extra-Bargaining Unit Organizing

The nonmembers argue that the Board's decision was in error because the Supreme Court in *Beck* foreclosed the possibility that extra-bargaining unit organizing is germane to collective bargaining. This argument finds its origin in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), in which the Supreme Court held that organizing was not germane to collective bargaining under the Railway Labor Act ("RLA"), and therefore its costs could not be charged to nonmembers. The RLA, in contrast to the NLRA, does not establish an administrative agency that is authorized to interpret and enforce the Act. In *Ellis,* therefore, unlike in cases under the NLRA, there was no administrative agency to which the courts could defer, and the judiciary was required to make its own determinations, *ab initio,* as to whether various activities were germane to collective bargaining.

The *Ellis* decision was made in the context of a statute designed to regulate the railroad industry. At the time the RLA was enacted, that industry was highly organized and the employers (and the organizing activities) were national in scope. The Court emphasized the fact that the president of a major railway

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[13] We leave it to the Board to determine, in subsequent cases applying the rule we today approve, whether or not challenged organizing expenses indeed relate to "organizing within the same competitive market."

labor union specifically represented to Congress at the time of the enactment of § 2, Eleventh of the RLA that the union shop would have no effect on the bargaining power of unions covered by the Act, and that it would serve only to make those unions stronger generally.[14] 466 U.S. at 451-52, 104 S.Ct. 1883. In addition, *Ellis* involved organizing that, in contrast to the case before us, was directed in part at employers that were not in the same branch of the transportation industry as the bargaining unit employer, and even at employers that were not in the transportation industry at all.[15] *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 685 F.2d 1065, 1075 (9th Cir.1982) (Whelan, J., dis-**[1110]**senting) quoting the lower court's findings of undisputed material facts as to the nature of the disputed expenses). In *Ellis,* the Court concluded that the only purpose organizing under the RLA could serve was to strengthen the union generally. Because this provided only attenuated benefits to nonmembers within a bargaining unit, the Court held that under the RLA organizing costs could not be charged to such individuals. 466 U.S. at 451, 104 S.Ct. 1883.

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[14]The RLA union-security clause, § 2, Eleventh, 45 U.S.C. § 152, enacted in 1951, was explicitly modeled on § 8(a)(3) of the NLRA, and the language of the two provisions is virtually identical. Section 2, Eleventh states that employers and unions may enter into agreements "requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, . . . all employees shall become members of the labor [union]." The provision describes the required dues as "the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

[15]The Court did not comment on the fact that the employer in *Ellis* was an airline rather than a railroad. We, too, consider that fact to be of no significance. The Court was construing an Act that was designed to govern the railroad industry and that was only amended later to cover the airline industry as well. *See* note 1, *supra.*

The nonmembers next point to the Court's statements in *Beck* that the RLA provision at issue in *Ellis* and the NLRA provision at issue in *Beck* are "statutory equivalents," which are "in all material respects identical," and that "Congress intended the same language to have the same meaning in both statutes." 487 U.S. at 745-46, 108 S.Ct. 2641. These statements were made in the context of the Court's holding that the provisions of the two Acts were designed to afford employees the same protection: that Congress intended to protect employees covered under both Acts against the unions' use of their dues for purposes not germane to collective bargaining. The nonmembers urge us to extend the Court's reasoning so as to hold that because organizing, which is conducted for the general purpose of strengthening the union, is not germane to collective bargaining under the RLA, the extra-bargaining unit organizing of competitor employers cannot be germane under the NLRA. 487 U.S. at 745-46, 108 S.Ct. 2641. Essentially, the nonmembers contend that the Supreme Court's statements in *Beck* regarding "statutory equivalen[ce]" require that the RLA provision and the NLRA provision be applied identically at the level of the specific expenditures that may be charged to nonmembers: They assert that expenditures not chargeable under one statute are necessarily not chargeable under the other, or to put it differently, that what is "germane" under one Act is identical in all cases and circumstances to what is "germane" under the other.[16]

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[16]The nonmembers assert that this court held in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir.1970), *further proceedings*, 533 F.2d 1126 (9th Cir.1976), that RLA cases interpreting the equivalent union-security provision are "equally applicable" to the NLRA. They grossly mischaracterize our statement in *Seay*. In *Seay*, we stated that two specific cases, *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), and *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), RLA cases dealing with the constitutional question of whether nonmembers' dues could be used for political purposes, were equally applicable to the NLRA. *Seay*,

We should first remove any question as to whether the *Beck* Court dealt with the question of *what* activities are germane to collective bargaining. It did not. In *Beck,* the union argued that unlike the RLA, the NLRA does not restrict unions to charging nonmembers only for those activities that are germane to collective bargaining, and that unions are free under the NLRA to expend nonmembers' dues on activities that do not serve to advance their interests as members of the bargaining unit. The Court rejected this argument, holding that Congress' intent in both statutes was the same—to permit only those expenditures that are germane to the collective bargaining function. 487 U.S. at 762-63, 108 S.Ct. 2641. It left to the Court of Appeals the ultimate resolution of the question of which specific expenditures were germane and therefore chargeable to nonmembers.

[1111]It is equally clear that the Court did not intend that "statutory equivalen[ce]" be applied at the level of specificity urged by the nonmembers, and that the NLRB remains free to determine what union activities are germane to collective bargaining in industries covered by the NLRA. There are two principal reasons why we conclude that the nonmembers' argument that "statutory equivalen[ce]" should apply to specific determinations of germaneness misperceives the force of the *Beck* statements. First, the nonmembers' reading of the term ignores the fact that Congress established entirely different procedures for the interpretation of each Act. Under the NLRA, primary jurisdiction over its interpretation lies with the NLRB, but under the RLA, exclusive jurisdiction lies, as with many statutes, with the courts. This difference was explicitly recog-

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427 F.2d at 1003; *Seay,* 533 F.2d at 1128 n. 3. The nonmembers in this case make no similar constitutional claim, and do not contend that the holdings in *Street* and *Allen* are controlling.

nized by the Supreme Court in *Beck*, in which it asserted that "[u]nlike the NLRA, . . . the RLA establishes no agency charged with administering its provisions, and instead leaves it to the courts to determine the validity of activities challenged under the Act." 487 U.S. at 743, 108 S.Ct. 2641. This difference alone militates strongly against the automatic application of factual findings made by courts regarding the "germaneness" of various union activities in the nationwide transportation industry to cases involving run-of-the-mill local commercial businesses covered by the NLRA.

The practical effect of the nonmembers' argument would be to deprive the NLRB of its jurisdiction to make factual determinations regarding what is germane to collective bargaining in industries that have entirely different bargaining histories and procedures than the railroad industry. Adjudicating issues relating to the manner in which a union may properly operate is a major function of the NLRB, and the expertise of the Board in factfinding and the operation of labor policy is substantial. Moreover, the specific question presented in this case—whether "organizing" is "germane to collective bargaining"—is a complex and difficult one for the layman, member of the judiciary or not. The answer requires a sophisticated understanding of labor relations and the collective bargaining process. As the Seventh Circuit noted in *International Association of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir.1998), *cert. denied*, 525 U.S. 813, 119 S.Ct. 47, 142 L.Ed.2d 36 (1998),

> [i]t is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of . . . the statute as authoritatively construed in *Beck* . . . into a workable

> system for determining and collecting agency fees.

133 F.3d at 1015.

The second reason we read the statutory equivalence statements as not requiring that all decisions regarding germaneness be identical under the two Acts is that the Supreme Court in *Ellis* explicitly based its decision upon its close review of the legislative history of the RLA. The Act was adopted in order to provide a labor relations structure for the railroad industry—an industry that was highly organized, and in which the process of collective bargaining was significantly different from that which exists under the NLRA.[17] The RLA **[1112]**establishes a highly detailed mandatory scheme for dispute resolution that has no parallel in the NLRA. In the case of a "minor" dispute[18] under

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[17]The industries covered by the RLA, at the time of enactment of the RLA union-security provision, had over 90% membership. *International Machinists v. Street,* 367 U.S. at 754, 762, 81 S.Ct. 1784 (citing Congressional testimony). In contrast, the industries covered by the NLRA historically had very low levels of organization. Unionization levels in the private sector peaked at 38% in 1954, after about 20 years of growth following the passage of the NLRA. By 1993, union density had fallen to 13%, and is now less than 10%. Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers,* 53 U. Miami L.Rev. 1089, 1103 (1999). *See also* Jennifer Friesen, *The Costs of "Fee Speech" — Restrictions on the Use of Union Dues to Fund New Organizing,* 15 Hastings Const. L.Q. 603, 642 (discussing the "dramatic decline in union strength since the end of World War II").

[18]"Minor" disputes "are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." *Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.,* 353 U.S. 30, 32, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); RLA § 2, Sixth. "Major" disputes "result when there is disagreement in the bargaining process for a new contract." 353 U.S. at 32, 77 S.Ct. 635; RLA § 2, Seventh.

the RLA, the union and employer are required to attempt to negotiate a settlement, and if unsuccessful, to submit to binding arbitration. RLA § 3, First. In the case of a "major" dispute, after negotiation and mandatory mediation are attempted, the parties must consider binding arbitration. §§ 6, 2, Second, 5, First, 7. Should either party refuse to arbitrate, the President may establish an Emergency Board where appropriate to investigate and report on the dispute. § 10. Only after completing these steps may a union or employer resort to self-help such as a strike or other unilateral action. §§ 2, Seventh, 5 First, 6, 10. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company,* 394 U.S. 369, 378-379, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969). The NLRA contains no similar scheme and no mandatory process of dispute resolution. In fact, the process by which collective bargaining is conducted, as well as the subject matter of that bargaining,[19] and the methods by which most contracts are ultimately obtained,[20] all differ substantially. In recognition of these and other differences, the Supreme Court has noted with respect to the collective bargaining process, "The relationship of labor and management in the railroad industry has developed on

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[19]Although under both Acts, there is a duty to bargain in good faith over certain subjects, and parties are permitted to bargain to an impasse over them, the Court has stated explicitly that the mandatory scope of bargaining under each Act is not the same, despite similar language describing the duty to bargain. *First Nat. Maintenance Corp. v. N.L.R.B.,* 452 U.S. 666, 686 n. 23, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981).

[20]In the transportation industry, the vast majority of disputes are settled by direct negotiation, and resort to strikes is relatively rare. The number of strikes in NLRA-covered industries far outstrips the number of strikes in the transportation industry; where there were thousands of NLRA strikes per year, one study showed that roughly a dozen occurred annually in the transportation industry. Beatrice M. Burgoon, *Mediation of Railroad and Airline Bargaining Disputes,* The Railway Labor Act at Fifty: Collective Bargaining in the Railroad and Airline Industries 71, 73-74, 93-94 (1977).

a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act." *Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 31 n. 2, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). It is implausible, given these significant differences between the processes by which labor unions and employers negotiate agreements and resolve disputes under the two Acts, that in *Beck*, the Court intended, without so stating, that only what is "germane" to the bargaining process under the RLA can be considered "germane" to the entirely dissimilar bargaining process under the NLRA.

[1113]We recognize that in *Beck* the unions argued that differences between the two statutes and in their legislative histories required that the two provisions at issue here be given entirely different meanings. The Court rejected the argument, holding that the provisions were to be given the same meaning: under both Acts, the Court said, only the costs of activities germane to collective bargaining may be charged to nonmembers. Giving the provisions this same general meaning, however, does not mean that they must be applied identically under two entirely different sets of factual and legal circumstances. The Court has stated that there are significant limitations on the analogies that can be drawn between the two statutes. For example, in *Jacksonville Terminal Co.*, the Court refused to read the secondary boycott prohibitions of the NLRA into the RLA, because although the NLRA is helpful in "mapping out very general boundaries of self-help under the [RLA]," the complexities of the question presented and the fact that "[f]rom the point of view of industrial relations our railroads are largely a thing apart" made it inappropriate to try to incorporate into the RLA the "detailed law" on the subject developed under the NLRA. 394 U.S. at 391-92, 89 S.Ct. 1109 (citations omitted). The boundaries for the proper application of the *Beck* statements stem

from similar reasons and have a similar effect: The *Beck* statements do not require that courts import the "detailed law" developed under the RLA into the NLRA.

The Supreme Court has repeatedly admonished the lower courts against overreading its precedents, and we find that admonishment particularly applicable here. *See Alexander v. Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 1517, 149 L.Ed.2d 517 (2001) ("[T]his Court is bound by holdings, not language."). Perhaps recognizing the differences in organizing under the two statutes and the required deference to the NLRB, the *Beck* Court offered no indication of what types of expenditures might be 'germane to collective bargaining,' or 'necessary to performing the duties of the exclusive bargaining representative,' under the NLRA when it held that 'germaneness' was the applicable standard under both statutes. We see no reason to extend, and thereby transform, the holding of *Beck* into a decision the Court did not make.

In the case before us, the Board undertook thorough fact-finding and a searching examination of the statute and the governing case law when applying the *Beck* germaneness rule to the case of organizing. Its findings regarding NLRA-covered industries revealed factual and economic circumstances that are wholly different from those prevailing in the railroad industry when the RLA provision was enacted, and at the present time, including fundamental differences in the nature of the bargaining process itself. Based on all these circumstances, the Board reached the conclusion that organizing under the NLRA, at least with respect to competitors of the employers' employees, is germane to collective bargaining. The result reached by the Board is not precluded by the language of *Beck,* but is fully

consistent with it. Accordingly, it is our duty under the NLRA, to affirm the Board's decision and enforce its order.[21]

[1114]IV. Conclusion

We agree with the Board that the decision of the Supreme Court in *Beck* is not to be read as holding that only expenses that are germane under the RLA are germane under the NLRA, and we conclude that we are required to defer to the Board's ruling in this proceeding—a ruling that is consistent with the language and purpose of the NLRA, as well as with the economic realities of the collective bargaining process. Accordingly, we hold that under § 8(a)(3) of the NLRA, a union serving as a bargaining unit's exclusive bargaining representative is permitted to charge nonmembers the costs involved in organizing, at least when organizing employers within the same competitive market as the bargaining unit employer.

Enforcement of the Board's orders with respect to Locals 7 and 951 is GRANTED. The petitions for review of those

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[21]In addition to the unfair labor practice charges brought against Locals 7 and 951 by several nonmembers, petitioner Hilton brought a charge against United Food and Commercial Workers Union Local 1036 claiming that the "welcoming letter" issued by the local was inadequate to advise new employees of their rights under *NLRB v. General Motors Corp.*, 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963). The NLRB found that the letter indeed was inadequate and ordered that the union take certain affirmative steps to remedy the violation. 329 NLRB No. 69, 1999 WL 818607, at *16-*19. We conclude that the original panel opinion issued in appeal No. 99-71317 was correct as to the "welcoming letter," and we reinstate the part of the opinion upholding the Board's decision that the letter was inadequate to advise new employees of their *General Motors* rights, but remanding for the Board to modify its remedy as it was overbroad. *United Food and Commercial Workers Union v. NLRB*, 249 F.3d at 1120.

orders are DENIED. Enforcement of the Board's order with respect to Local 1036 is DENIED. The petition for review of that order is GRANTED. The matter involving Local 1036 is REMANDED to the Board for action in accordance with this opinion.

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT VACATING THE OPINION OF THE ORIGINAL PANEL AND ORDERING THAT THE CASE BE REHEARD *EN BANC*

September 14, 2001

[265 F.3d 1079]

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1036, Petitioner,

Phillip Mulder; Charles Buck; Leon Gibbons; United Food and Commercial Workers Local 7; United Food and Commercial Workers Local 951, Intervenors,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

Glenn Hilton; United Food and Commercial Workers Local 951, Respondents-Intervenors.

[Remainder of caption omitted in printing]

United States Court of Appeals,
Ninth Circuit.

Filed Sept. 14, 2001

Before: SCHROEDER, Chief Judge.

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court,[1] **[1080]**it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

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[1] Judge Berzon was recused.

APPENDIX C

ORDER OF THE PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FINDING THE PETITIONS FOR REHEARING *EN BANC* TO BE TIMELY FILED

August 2, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1036, Petitioner, LOCAL NO. 7; PHILLIP MULDER; CHARLES BUCK; LEON GIBBONS; UNITED FOOD AND COMMERCIAL WORKERS LOCAL 951, Intervenors, v. NATIONAL LABOR RELATIONS BOARD, Respondent, GLENN HILTON; COMMERCIAL WORKERS UNION, Commercial Workers Union Local 951, Respondents-Intervenors. [Remainder of caption omitted in printing]	No. 99-71317 No. 99-71442 No. 00-71596 No. 00-70156 No. 00-70189 329 NLRB No. 69 No. 16-CB-3850 [date stamp omitted in printing] ORDER

Before: NOONAN, McKEOWN, and WARDLAW, Circuit Judges:

The briefs filed by the National Labor Relations Board and the United Food & Commercial Workers Locals 7 & 951 setting forth their respective positions on whether this case should be heard en banc pursuant to the Court's order of June 28, 2001, are deemed to be timely filed petitions for rehearing with suggestion for rehearing en banc and will be disposed of as such on the merits.

APPENDIX D

SUE SPONTE* ORDER OF THE PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT REQUIRING BRIEFING ON WHETHER THE CASE SHOULD BE REHEARD *EN BANC

June 28, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1036, Petitioner, LOCAL NO. 7; PHILIP MULDER; CHARLES BUCK; LEON GIBBONS, UNITED FOOD AND COMMERCIAL WORKERS LOCAL 7; UNITED FOOD AND COMMERCIAL WORKERS LOCAL 951, Intervenors, v. NATIONAL LABOR RELATIONS BOARD, Respondent, GLENN HILTON; COMMERCIAL WORKERS UNION, Commercial Workers Union Local 951, Respondents-Intervenors. [Remainder of caption omitted in printing]	No. 99-71317 No. 99-71442 No. 00-71596 No. 00-70156 No. 00-70189 329 NLRB No. 69 No. 16-CB-3850 [date stamp omitted in printing] ORDER

Before: NOONAN, McKEOWN, and WARDLAW, Circuit Judges:

The parties are ordered to file simultaneous briefs (50 copies) not to exceed 15 pages within 21 days of the filing of this order setting forth their respective positions on whether this case should be heard en banc.

APPENDIX E

DECISION OF THE ORIGINAL PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

May 17, 2001

[249 F.3d 1115]

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1036, Petitioner,

Phillip Mulder; Charles Buck; Leon Gibbons; United Food and Commercial Workers Local 7; United Food and Commercial Workers Local 951, Intervenors,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

[Remainder of caption omitted in printing]

Nos. 00-70156, 99-71442, 00-70189, 99-71596 and 99-71317.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 12, 2001
Filed May 17, 2001

* * * *

[1117]Before: NOONAN, McCKEOWN, and WARDLAW, Circuit Judges.

Opinion by Judge NOONAN; Concurrence by Judge WARDLAW

NOONAN, Circuit Judge:

In these consolidated cases, Phillip Mulder, Charles Buck, Leon Gibbons, Glenn Hilton, Rebecca McReynolds and Barbara Kipp (the petitioners) petition for review of an order of the National Labor Relations Board (the Board or the NLRB) holding that they as nonmembers of a union may be charged under union security agreements with their employers with a fee related to the union's activity directed to organizing employees of the employers' competitors. The Board cross-petitions for enforcement of its order. We hold that organizational activity is not necessary for the union's performance of its duties as the exclusive representative of the employees. To require non-member employees to fund such activity is not authorized by section 8(a)(3) of the National Labor Relations Act (the NLRA), 29 U.S.C. § 158(a)(3). Accordingly, we grant the petition for review, vacate the order of the Board, and remand for entry of an order holding Locals 7 and 951 of the United Food and Commercial Workers (the UFCW), to have violated section 8(b)(1)(A) and (2) of the NLRA, 29 U.S.C. § 158(b)(1)(A) and (2), and providing a remedy for the violations.

UFCW, Local 1036 (Local 1036) petitions for review of an order of the Board holding that Local 1036 violated section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), by informing new employees that they were required as a condition of employment to become full members of Local 1036. The Board cross-petitions for enforcement of its order. We hold that Local 1036 did violate section 8(b)(1)(A) but that the Board's remedial order is too broad. Accordingly, we reverse the Board and remand for the Board to draft an order better tailored to the violation.

FACTS AND PROCEEDINGS

It is uncontested that the petitioners, employees of grocery and general merchandise retail businesses having union security clauses in their respective collective bargaining agreements with locals of the UFCW, are non-members of the union who objected to paying fees for the organizing activities of the UFCW; that the union did charge nonmembers for such activities; and that the locals continued to exact the fees over the objection of the petitioners. The petitioners brought unfair labor practice charges against the respective locals.

After a trial, Administrative Law Judge William J. Pannier III dismissed the charges that Locals 7 and 951 violated section 8(b)(1)(A) of the NLRA. A divided Board sustained the dismissal. Noting testimony both by economists and by union officers, the Board found the record to contain persuasive evidence of a positive relation in the retail food industry between the unionization of employees and negotiated wage rates. When more competitors faced union wages, management was willing to negotiate. "We don't mind paying the wages as long as everyone else is paying the same thing" was said to typify the prevalent attitude of employers. The Board concluded that the non-members benefitted from the union organizing employees of the other employers and that this activity was fairly chargeable as representational.

The NLRB acknowledged one problem in reaching its conclusion. In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 466 U.S. 435, 452, 104 **[1118]**S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Supreme Court of the United States held that under section 2, Eleventh of the Railway Labor Act (the RLA), 45 U.S.C. § 152, Eleventh, a union was not permitted to charge non-members for the union's organizing activity outside of the bargaining unit. Then in *Communications Workers of America v. Beck,* 487 U.S. 735, 745, 108 S.Ct. 2641, 101

L.Ed.2d 634 (1988), the Supreme Court held that, despite other differences in the statutory schemes, section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA are "in all material respects identical." If the Supreme Court was taken at its word, that Court had already determined that organizational expenses were not chargeable to nonunion members.

The Board met this difficulty by stating that "precedent under public sector labor law and the Railway Labor Act, although possibly providing useful guidance, is not binding in the context of the NLRA." The Board went on to note that the Supreme Court in deciding *Ellis* had relied on the legislative history of the 1951 amendment that added section 2, Eleventh to the RLA. The major purpose of the RLA, to prevent strikes in the transportation industry, was different from the major purpose of the NLRA. Further distinguishing the two laws, the Board observed that when the RLA was enacted in 1926, railroad employees were already substantially organized; there was no reason for Congress to contemplate further organizing by the existing unions. Finally, the Board stated that in *Ellis* the only benefit to be achieved by organizing was a stronger union; here the Board found a tangible relation between increased unionization in the same industry and increased wages for all employees in the bargaining unit. The Board was satisfied that it had distinguished *Ellis*. As to *Beck*, the Board followed *International Ass'n of Machinists and Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir.), *cert. denied*, 525 U.S. 813, 119 S.Ct. 47, 142 L.Ed.2d 36 (1998), in holding that *Beck* left open what union expenditures could be charged to objectors under the NLRA.

A second issue before the Board was whether Local 1036 had violated § 8(b)(1)(A) of the NLRA by a welcome letter to new employees in which the union informed them that they were required to become full members of Local 1036 as a condition of employment and did not inform them that they had the right to be

nonmembers of the union and the right not to be charged by the union for nonrepresentational activities. The administrative law judge found the letter to be a violation, and the Board agreed. As a remedy for the violation, the Board required Local 1036 to notify all bargaining unit members of their rights and to reimburse nunc pro tunc the employees subject to the union security clause after September 3, 1988 who now objected to being full union members.

The petitioners seek review of the Board's order as to organizing expenses. Local 1036 seeks review of the Board's order as to the welcome letter. The Board seeks enforcement of its orders.

ANALYSIS

On the main issue, the chargeability of organizing expenses, the Board stands on its decision and asks us to enforce it with the deference due an administrative agency interpreting an ambiguous statute in the area of the agency's expertise. *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). That the tie between wage benefits for existing bargaining units and the organization of new bargaining units was disputed and may not exist in all industries or at all times is irrelevant to this ap-**[1119]**proach. Substantial testimony supports the conclusion of the Board; it has resolved the disputed testimony by finding that, at least in the retail chain businesses involved here, a link between organizing and benefits to bargaining units does exist. The Board has defined, at least in the context of these cases, representational work by a union to include the union's organizing activity beyond the existing bargaining units.

If that were all that was before us, enforcement of the Board's order would be our obvious duty. But the Board does not have a free hand to interpret a statute when the Supreme Court has already interpreted the statute. *Lechmere, Inc. v.*

NLRB, 502 U.S. 527, 536-37, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992). Here the Supreme Court has already interpreted section 8(a)(3).

In *Ellis,* the Supreme Court held organizing expenses to be "outside Congress' authorization" in section 2, Eleventh of the RLA. *Ellis,* 466 U.S. at 451, 104 S.Ct. 1883. In *Beck,* the Supreme Court held that section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA "are in all material respects identical." *Beck,* 487 U.S. at 745, 108 S.Ct. 2641. The Court reached this conclusion in deciding whether the financial core requirement of a union security clause "includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Id.* Deciding this question in the negative, the Court repeated its description of section 8(a)(3) and section 2, Eleventh as "statutory equivalent[s]." *Id.* (citing *Ellis,* 466 U.S. at 452 n. 13, 104 S.Ct. 1883). Noting that in amending the RLA in 1951, Congress had "expressly modeled" section 2, Eleventh on section 8(a)(3), the Court declared: "In these circumstances, we think it clear that Congress intended the same language to have the same meaning in both statutes." *Id.* at 746-47, 108 S.Ct. 2641.

In the face of the declared equivalence of the two statutes, the Board's effort to distinguish *Ellis* fails. If the language in one has the same meaning as the language in the other, then organizing expenses cannot be nonchargeable under one statute and chargeable under the other. A material difference cannot be found between the two statutes on the ground that they deal with different industries. Congress, the Court has determined, meant union security agreements to embrace only such charges as did not intrude upon the First Amendment rights of non-members. *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 519, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991). Although the Court's decisions in this area "prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting

employees," the Court has already established "several guidelines to be followed in making such determinations." *Id. Ellis* and *Beck* are such guidelines. As *Lehnert* illustrates, the RLA cases, including *Ellis,* function to determine the scope of chargeable activities under the NLRA § 8(a)(3). *Id.* at 514-19, 111 S.Ct. 1950.

In enacting section 2, Eleventh, "organizing efforts were not what Congress aimed to enhance by authorizing the union shop." *Ellis,* 466 U.S. at 452, 104 S.Ct. 1883. "[I]t may be that employees will ultimately ride for free on the union's organizing efforts outside the bargaining unit," but "the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Nonbargaining unit organizing is not directed at that employee." *Id.*

The Board, we have noted, took courage from the Seventh Circuit decision in *International Ass'n of Machinists,* 133 F.3d at **[1120]**1015-16. But that opinion did not take notice of the statutory equivalence established by *Beck.* Consequently it is no authority for disregarding that equivalence here.

The Board presents a case for rethinking the *Ellis-Beck* equivalence of section 8(a)(3) and section 2, Eleventh. The Board does not have the power to reverse the Supreme Court. *See State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (discussing rule of stare decisis). Accordingly, its order must be vacated, and the case returned to it for an order upholding the rights of the petitioners.

As to the second issue, Local 1036 admits that its welcome letter to new employees was "inartfully worded to suggest that employees had to do more than pay dues and fees." The Board was not unreasonable in finding that the letter did not adequately advise the new employees of their rights under *NLRB v. General Motors Corp.,* 373 U.S. 734, 742, 83 S.Ct. 1453, 10

L.Ed.2d 670 (1963) and *Beck*. But the Board's remedial order goes too far. The offending letter was not sent to all employees. Reimbursement is due only those employees who received the letter and object. The remedy designed by the Board must be modified.

Accordingly, enforcement of the Board's orders is DENIED. The petitions for review are GRANTED. The cases are REMANDED to the Board for action in accordance with this opinion.

WARDLAW, Circuit Judge, concurring:

I agree with the majority that we are bound by the Supreme Court's decisions in *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), and *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), to reverse the decision of the Board. Neither the Board nor we can alter or even meaningfully distinguish *Beck*'s twin holdings that (i) NLRA § 8(a)(3) and § 2, Eleventh of the RLA are "statutory equivalents," which (ii) preclude charging organizing expenses to objecting nonmembers. This rule would make sense in an industry and a competitive environment where no benefit inured to the nonmember objectors from uniform wage and benefit standards. But here, after reviewing academic research, empirical data and specific evidence as to the direct, positive relationship between the extent of unionization of employees and negotiated wage rates in the retail food industry, the Board concluded otherwise. It is troubling that *Beck* precludes us from giving the deference to the fact-finding and expertise of the agency charged with administering the labor laws that it would otherwise be accorded under *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As Judge Posner, writing for the Seventh Circuit, has noted:

> It is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of the *Beck* decision (more precisely, of the statute as authoritatively construed in *Beck*) into a workable system for determining and collecting agency fees.

Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 133 F.3d 1012, 1015 (7th Cir.1998). I respectfully submit that a case-by-case, industry specific approach, see *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 519, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), which applies *guidelines,* not categorical rules, is the preferable approach. Not being presented with that **[1121]** option in this case, however, I concur in the majority opinion.

APPENDIX F

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

September 30, 1999

[329 N.L.R.B. 730]
United Food and Commercial Workers Local 951, 7 and 1036 (Meijer, Inc.) *and* Various Individuals.
Cases 16-CB-3850 (2-6, 9025, 27, 33, 35-36)

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On January 31, 1997, Administrative Law Judge William J. Pannier III issued the attached supplemental decision. [See Appendix G herein]. (Original decision omitted from publication.) The General Counsel, Respondent United Food and Commercial Workers Local 1036, and various Charging Parties filed exceptions and supporting briefs, and the Respondents and various Charging Parties also filed answering or reply briefs.[1] Additionally, the American Federation of Labor and Congress of Industrial Organizations filed a brief as amicus curiae.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the

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[1]Specifically, the General Counsel filed exceptions and a supporting brief; Charging Parties Mulder, Buck, Gibbons, and Hilton filed exceptions and a supporting brief; Charging Parties McReynolds and Kipp filed exceptions and a supporting brief; United Food and Commercial Workers Local 1036 filed cross-exceptions and a supporting and answering brief; United Food and Commercial Workers Local 951 filed an answering brief; United Food and Commercial Workers Local 7 filed an answering brief; Charging Party Hilton filed an answering brief; and Charging Parties Mulder, Buck, Gibbons, McReynolds, and Kipp field a joint reply brief.

judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.

The case concerns application of the Supreme Court's decision in *Communications Workers v. Beck*,[2] which held that a collective-bargaining representative violates its duty of fair representation if, over the objection of dues-paying nonmember employees, it expends funds collected under a union-security agreement on activities unrelated to collective bargaining, contract administration, or grievance adjustment. The Respondents in this case are certain United Food and Commercial Workers local unions located in Michigan (Local 951), Colorado (Local 7), and California (Local 1036). The central issue in this case is the chargeability to nonmembers of fees related to expenditures for organizing activities.

A. Chargeability of Oranizing Expenses

1. The judge's findings

The consolidated complaint alleged, among other things, that Local 951 and Local 7 violated Section 8(b)(1)(A) of the Act by allocating expenditures for organizing as chargeable to objecting nonmember employees and by expending dues and fees collected from them for such activities. The judge dismissed this allegation against both Locals. For the reasons set forth in section A-3 below, we agree.

Local 951 had three collective-bargaining agreements with Meijer, Inc., a Michigan retailer, covering various bargaining units.[3] Each agreement contained a union-security clause.

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[2]487 U.S. 735 (1988).

[3]The three contracts were identified as the Newport Distribution Center Contract, the Retail Contract, and the Distribution Center Contract.

As recounted by the judge, Meijer employees Mulder, Buck, and Gibbons, on certain dates in 1988 and 1989, resigned their union memberships and notified Local 951 that they objected to paying for nonrepresentational activities. While Local 951 acknowledged each resignation, it continued to demand that each employee pay full membership dues, to be placed in escrow pursuant to Local 951's service rebate procedure. Amounts attributable to what Local 951 deemed to be nonrepresentational activities were then to be remitted to each nonmember-employee on June 1 and December 1 of each year. The judge found that various aspects of Local 951's conduct in regard to Mulder, Buck, and Gibbons violated Section 8(b)(1)(A) of the Act.[4] The judge dismissed, however,

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[4]No exceptions were filed to the judge's findings that Local 951 violated Sec. 8(b)(1)(A) by (1) requiring objecting nonmembers to exhaust remedies provided by its service rebate procedure for challenging dues reductions prior to seeking judicial review; (2) continuing to collect the full amount of membership dues from objecting nonmembers; (3) failing to disclose to objecting nonmembers the activities for which 6.62 percent of its total annual expenditures had been made; (4) collecting and retaining fees from objecting nonmembers that were allocable to lobbying expenses; (5) failing to provide objecting nonmembers with information concerning the purposes for which the dues income that it remitted to United Food and Commercial Workers International Union was used; and (6) filing and pursuing in Federal court an application for an order to confirm an arbitration award against three objecting nonmembers.

Local 951 filed no exceptions to the finding that it unlawfully failed to provide information concerning the International's expenditures of dues that the Local remitted to the International. Accordingly, it is unnecessary to reach the issue of the extent to which a Local Union is obligated to provide such information to objecting nonmembers. Cf. *Teamsters Local 75 (Schreiber Foods)*, 329 NLRB No. 12, slip op. at 4 fn. 10 (1999) (sufficient disclosure for Local Union to inform objectors of the amount of "per capita tax" forwarded to affiliated bodies, as well as the proportion that was spent on nonrepresentational functions; not unlawful for Local to fail to breakdown how the affiliated organizations spent the money

[731]an allegation that Local 951 violated Section 8(b)(1)(A) by allocating expenditures for organizing as chargeable to non-members.

Local 7 had collective-bargaining agreements with City Markets, a retail grocer, covering employees in Glenwood Springs, Fruita, Grand Junction, and Steamboat Springs, Colorado. Local 7 also had a collective-bargaining agreement with Champion Boxed Beef, a beef processor, covering its Denver employees. These collective-bargaining agreements contained union-security clauses, except that City Markets employees in Glenwood Springs and Fruita were not subject to a union-security provision in the 1990-1993 collective bargaining agreement.

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forward to them.)

Member Hurtgen notes the Charging Parties filed exceptions with respect to the Local's failure to report the amount of money sent to the International and the proportion thereof that was spent by the international on nonrepresentational functions. See *Schreiber*, supra. In agreement with these exceptions, and consistent with *Schreiber*, Member Hurtgen would find this failure to be unlawful. If the Local does not have this information, it must at least seek to obtain it from the International.

We agree with the judge that Local 951 did not violate Sec. 8(b)(1)(A) by including in its challenge procedure a requirement that objectors appeal the Union's determination of chargeable and nonchargeable expenditures to its executive board before presenting their challenges to an impartial arbitrator. Under this procedure, an objector may appeal the Union's determinations at the next regularly scheduled meeting of the executive board, which must make a decision with 15 days. The employee then has 10 days to object to the executive board's decision. This is a reasonably expeditious schedule, and we therefore reject the General Counsel's exception contending that the initial step results in unreasonable or arbitrary delays in the process of placing a challenge before an arbitrator. See *Teamsters Local 75 (Schreiber Foods)*, supra, slip op. at 5 (finding no violation in similar appeal procedure with "expedient time deadlines"). Member Hurtgen also notes that the employee can forego arbitration altogether and make his claim to the NLRB.

On various dates in 1989, nine City Markets employees in Glenweed Springs,[5] one in Grand Junction,[6] and one in Fruita[7] notified Local 7 that they were resigning their union memberships and objected to paying for nonrepresentational activities. Additionally, on certain dates in 1989, three employees of Champion Boxed Beef[8] notified Local 7 that they resigned their union memberships and objected to paying for nonrepresentational activities.[9] In response, Local 7 sent letters to the employees acknowledging their election of "financial core member" status, advising them of the reduced fees for which they were obligated, and informing them of Local 7's major expenditures, including a designation of chargeable and nonchargeable expenses. These letters and the statement of chargeable expenditures enclosed with them indicated that Local 7 considered expenditures for organizing activities to be chargeable to objecting nonmember employees. Other than the issue of organizing expenses, all complaint allegations regarding Local 7's conduct or policies in response to these employ-

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[5]Employees Berg, Flewelling, Hass, McReynolds, McVey, Schierbrock-Hutchins, Shaffer, Vance, and White. Employees Flewelling and Hass transferred from Glenwood Springs to Grand Junction on October 7, 1989.

[6]Employee Whaley.

[7]Employee Kipp.

[8]Employees Boyens, Jones, and Marshall.

[9]Employees Jones and Marshall rejoined Local 7 in January 1990.

ees' election of objecting nonmember status were resolved in a settlement approved by the judge.[10]

In dismissing the complaint allegations that Locals 7 and 951 violated Section 8(b)(1)(A) by allocating expenditures for organizing as chargeable to nonmembers, the judge rejected contrary precedent in Railway Labor Act and public sector employment cases. The judge noted that the Board had concluded in *California Saw & Knife Works*[11] that Railway Labor Act and public sector case precedent does not govern evaluation and allocation of union expenditures under the Act. Reviewing Congress' findings set forth in Section 1 of the Act, the judge found that, under the Act, employees of a particular employer or of employers in a particular industry cannot be viewed in isolation. Rather, Congress considered it necessary to view the entire employment picture. The judge further found that, under the congressional policies set forth in Section 1, including Congress' concern with the free flow of commerce and its desire to eliminate obstruction to commerce by encouraging the practice and procedure of collective bargaining, organizing is an activity consistent with representation and a necessary incident of one means chosen by Congress to promote the free flow of commerce. The judge did not make a ruling on the expert testimony that was presented concerning the proposition that wages, benefits, and working conditions of employees working for one employer are affected by the wages,

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[10]Charging Parties McReynolds and Kipp excepted to the judge's approval of the settlement. We adopt the judge's approval of the settlement for the reasons he stated in his Order Granting Motion To Approve Settlement Agreements.

[11]320 NLRB 224 (1995), enf. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998).

benefits, and working conditions which prevail in the industry or area. He found, however, that Congress believed this proposition to be true. He further noted that it is a commonly held belief that the competitiveness of a unionized employer is adversely affected when that employer's competitors are not unionized, because those competitors possess greater latitude to reduce prices than does the unionized employer. This belief is a basis for unionized employers' objections to unions' demands for increased wages and benefits. Therefore, it is a means for employer resistance to the improvement of employees' wage rates and purchasing power that Congress sought to achieve through protecting the right of employees to organize and become represented. Consequently, failing to categorize organizing as a representational activity, he reasoned, would undermine Congress' stated means for correcting ills that Congress found to restrain the free flow of commerce. Additionally, to avoid perceived constraints imposed by unionization on their ability to meet lowered prices of nonunion competitors, employers sometimes retaliate against employees who seek union representation. Such employer conduct creates industrial strife, disrupts employees' earnings, and prompts the expenditure of pub-**[732]**lic resources. Thus, situations outside employees' immediate employment relationship can affect their own representation and continued employment. Based on these considerations, the judge concluded that organizing activities are a necessary incident of collective bargaining and contract administration and, thus, are representational. Accordingly, he dismissed the complaint allegations that Locals 7 and 951 violated the Act by charging nonmembers for organizing expenses.

2. The parties' contentions

In excepting to the judge's dismissal, Charging Parties Mulder, Buck, Gibbons and Hilton rely on the Supreme Court's finding in *Ellis v. Railway Clerks,*,[12] that organizing expenses are nonchargeable to objecting nonmembers under the Railway Labor Act. The Charging Parties contend that *Ellis* found organizing expenses nonchargeable because Congress' justification for amending the Railway Labor Act to authorize the union shop was to prevent bargaining unit employees from not paying for the union's performance of its statutory functions on their behalf, and organizing necessarily is directed not at unit employees but, rather, at employees outside the bargaining unit. The Charging Parties contend that this analysis is no different under the National Labor Relations Act. They note that the Supreme Court in *Beck*[13] found the provisions of the Railway Labor Act and the National Labor Relations Act that authorize compulsory unionism to be identical in all material respects and that Congress "intended the same language to have the same meaning in both statutes."[14] They further note that the Supreme Court in *Ellis* was presented with the same arguments that the Respondents made in this case. The Charging Parties also contend that Local 951 represents employees in a variety of industries and that organizing among employers in these various industries provides, in the words of *Ellis*, "only the most attenuated benefits to collective bargaining on behalf of

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[12] 466 U.S. 435 (1984).

[13] Fn. 2, above.

[14] 487 U.S. at 747.

the dues payer."[15] Additionally, the Charging Parties contend that the testimony of Professors Paula Voos and Charles Craypo, who testified on behalf of the Respondents, was biased and superficial. They particularly argue that Professor Voos' report showing a positive relationship between grocery employees' earnings and the percentage of unionized grocery employees in given metropolitan areas showed that the percentage of unionization had, at most, only a small effect on wages, failed to take into account certain other variables, such as levels of unemployment, that affect wage rates, and covered only the 73 largest cities, where grocery employees tend to be more heavily unionized. The Charging Parties note that Professor Morgan Reynolds, called by the General Counsel, testified that the relationship between grocery employees' earnings and the percentage of unionized grocery employees was weaker than that shown by Professor Voos and that there were more lines of causation than her study took into account.

Charging Parties McReynolds and Kipp, who adopt the other Charging Parties' arguments, additionally contend that Professor Voos' report and testimony are irrelevant to the City Markets stores in Glenwood Springs and Fruita, Colorado, because these are small towns in rural areas, while Professor Voos' report concerned only grocery employees in the 73 largest metropolitan areas in the United States.

The General Counsel sets forth both arguments against and arguments in favor of finding organizing expenses chargeable, but ultimately contends that organizing expenses should be found chargeable and the judge's dismissal of the complaint allegation affirmed. As an argument against chargeability, the General Counsel notes that organizing is directed toward unrepresented employees and therefore could be said to be

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[15]Id. at 452.

unrelated to the union's performance of its duties to the employees whom it represents. Additionally, any effect on the union's bargaining strength derived from its organizing efforts is arguably too attenuated to support finding organizing expenses to be chargeable.

In support of chargeability, the General Counsel notes that in *Lehnert v. Ferris Faculty Assn.*,[16] decided after *Ellis*, the Supreme Court held that union activities need not be performed for the direct benefit of the nonmember objectors' bargaining unit in order to be chargeable to those objectors. Rather, to be chargeable, there must be "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union."[17] The General Counsel contends that the Respondents' efforts to organize other employers' employees are germane to their duties as representatives of the already organized units herein because all unit employees, including nonmember objectors, benefit from uniform wage and benefit standards in a job market that can be achieved only through organizing unorganized employees in that market. The General Counsel contends that evidence presented by the Respondents shows a strong connection between the level of union organization among workers in a given market area and the employees' wage and benefit levels. Thus, the Respondents' continuing efforts to ensure the presence of other, organized units, in the words of *Lehnert*, "ultimately inure[s] to the benefit of" all unit employees, including nonmember objectors. The General Counsel distinguishes *Ellis*' finding orga-**[733]**nizing expenses nonchargeable, on the ground that *Ellis* relied on legislative history of the Railway Labor Act in which a railway union president expressly denied that the union

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[16]500 U.S. 507 (1991).

[17]Id. at 524.

shop would strengthen the union's bargaining power. The General Counsel observes that the National Labor Relations Act has no similar legislative history and that the railway and airline industries were already heavily organized in 1951 when the Railway Labor Act was amended to permit union shops, while the industries covered by the National Labor Relations Act are much less heavily organized.

In urging that the judge properly found organizing expenses chargeable, Respondent Local 7 contends that organizing benefits already organized employees because organizing within a given labor market tends to increase all wages within the market and because, to bargain effectively, employees must form multiunit labor organizations to match the institutional strength of employers. The legislative history shows that, in fashioning the Act, Congress had these economic considerations in mind. Local 7 further contends that it is axiomatic among economists that there is a positive relationship between the extent of organization in an industry and negotiated wage rates. This relationship has been demonstrated through empirical studies as well as specific examples presented in this case. Experienced labor negotiators also accept this proposition as a matter of common sense, because the presence or absence of significant nonunion competition is a key factor in shaping employers' contract proposals. Local 7 contends that *Ellis* is distinguishable because its primary basis for finding organizing not chargeable was the legislative history of the Railway Labor Act, which is completely different from the legislative history of the National Labor Relations Act. While the Railway Labor Act essentially ratified an existing system of collective bargaining in a fully organized industry, the National Labor Relations Act was aimed at protecting the right to organize as well as the right to bargain collectively.

Respondent Local 951 contends that organizing expenses are germane to collective bargaining, and thus charge-

able, because the extent to which an industry or industries are organized directly affects the ability of a union to negotiate wage rates and working conditions. Local 951 contends that this proposition was shown by the testimony of economists and union negotiators, the design and purpose of the Act, and Supreme Court decisions recognizing a union's legitimate interest in eliminating nonunion competition in wages and working conditions to benefit its organized members.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) contends that organizing expenses are chargeable because there is a strong relationship between union organizing and collective bargaining. According to the AFL-CIO, spreading the combination of workers beyond one shop — i.e., organizing — is the predicate for the NLRA's declared purpose of "restoring equality of bargaining power between employers and employees" through the "practice and procedure of collective bargaining" as called for by Section 1 of the Act. Congress' intent in passing the NLRA was, in part, to permit employees of different employers to band together and to bar company-dominated unions, which did not permit association of employees beyond those of the single employer. Further, in passing the Taft-Hartley amendments in 1947, Congress defeated a proposal to ban industry-wide bargaining because it recognized that, for collective bargaining to function properly, "employees must make their combination extend beyond one shop"; otherwise "[t]he organized workers would ... be required to conform to the standards of the lowest paid, unorganized workers."[18] Further, as a factual matter, the AFL-CIO contends that, for a union to maintain sufficient staff and other resources to engage in effective collective bargaining, organizing must extend beyond a single bargaining unit and

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[18] 1 LMRA Leg. Hist. 680 (Rep. Price).

employees of a single employer. Similarly, multiunit organizing is necessary for a union to achieve the equality of bargaining power that the Act contemplates. Only diversification and size provide the union with means to withstand a long strike or lockout, such as an adequate strike fund and dues-paying members who are employed by employers not involved in the work stoppage. Further, as competition from an employer's nonunion competitors and the presence of large pools of unorganized labor undermine a union's ability to negotiate better terms for represented employees, unions must seek to organize nonunion employees in both the relevant product market and labor market in order to engage successfully in collective bargaining. Finally, the AFL-CIO distinguishes *Ellis* on the basis of the unique legislative history of union-security agreements under the Railway Labor Act, which is totally different from the history of such agreements under the NLRA.

3. Discussion

In *California Saw*, the Board held that a particular union expense attributable to activities outside an objector's bargaining unit may properly be charged to objectors only if it is (1) "germane to the union's role in collective-bargaining, contract administration and grievance adjustment" and (2) incurred "for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'"[19] Having considered the evi-**[734]**dence, the judge's decision, and the parties' arguments, we find that,

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[19]320 NLRB at 239, quoting *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 524 (1991). The standard for expenses incurred for activities within the objector's bargaining unit is simply that they be "germane" to the union's representational role, i.e. the first of the two tests for extra-unit expenses.

at least with respect to organizing within the same competitive market as the bargaining unit employer,[20] organizing expenses are chargeable to bargaining unit employees under the *California Saw* standard. We therefore find that Locals 7 and 951 did not breach their duty of fair representation by charging objecting nonmembers for organizing expenses. Our conclusion is based on the language of the Act and its underlying policies and on the economic realities of collective bargaining in general and in the retail food industry particularly. Also, as set forth below, we find that the Supreme Court's *Ellis* decision is distinguishable and not controlling under the NLRA.

At the outset, we note that the close relationship between organizing and collective bargaining is apparent from the language of the Act itself. In setting forth its findings and policies, Congress, in Section 1 of the Act, found that the denial of employees' rights to organize and bargain collectively had, among other things, so diminished employment and wages "as substantially to impair or disrupt the market for goods." Further, the inequality of bargaining power between employers and unorganized employees "tend[ed] to aggravate recurrent business depressions by depressing wage rates and purchasing power of wage earners" and "by preventing the stabilization of competitive wage rates and working conditions within and between industries." Congress further found that granting legal

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[20]There is no contention here that Local 7 and 951 have sought to organize employees of employers who are not competitors of the employers of the employees represented by the Respondents. Nor do we read the judge's decision as holding that a union's costs of organizing beyond the competitive market are chargeable to objectors. Accordingly, the organizing expenses that we find chargeable here are limited to those spent by Local 7 and Local 951 within the competitive market. We find it unnecessary to decide and shall defer to another case the question of whether unions may charge objectors for organizing costs incurred outside the competitive market.

protection to employees' rights to organize and bargain collectively "remov[ed] certain recognized sources of industrial strife" and "restor[ed] equality of bargaining power between employers and employees." Congress thus declared it to be the policy of the United States to eliminate "obstructions to the free flow of commerce" by "encouraging the practice and procedure of collective bargaining" and protecting workers' "exercise of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." These policy statements make plain that Congress envisioned broad economic benefits to society flowing from the organization of employees for the purposes collective bargaining. Implicit is Congress' understanding that organization of multiple groups of employees, not just a single bargaining unit or the employees of a single employer in an industry, was necessary to achieve its goals of stabilizing wage rates and preventing depression of employees' wage rates and purchasing power.

Beyond the language and policies of the Act, there is abundant evidence that, in collective bargaining, unions are able to obtain higher wages for the employees they represent, whether union members or not, when the employees of employers in the same competitive market are unionized. Expert testimony established that economists generally agree that there is a positive relationship between the extent of unionization of employees in an industry or locality and negotiated wage rates. That is, represented employees' wage rates increase or decline as the percentage of employees who are unionized increases or declines. A study prepared by Dr. Paula B. Voos, associate professor of economics and industrial relations at the University of Wisconsin-Madison, surveyed existing research and found that, out of some 20 studies by economists on the issue, all but two had found a significant positive relationship between the

percent of employees organized and the level of union wages. Dr. Charles Craypo, chair of the economics department at the University of Notre Dame, testified that the relationship between union organization and union bargaining power was first observed by economists early in this century and now is taken for granted by institutional labor economists. Even Dr. Morgan Reynolds, Professor of Economics at Texas A&M University, who testified as a witness for the General Counsel,[21] acknowledged that a positive relationship between the percent of employees organized and the level of union wages existed, although he believed that it was weaker than portrayed by Professor Voos.[22]

Additionally, the record contains persuasive evidence that the positive relationship between the extent of unionization of employees and negotiated wage rates exists specifically in the retail food industry, the principal industry in which Locals 7 and 951 represent employees. In her study, Professor Voos examined whether the wages of represented supermarket workers were influenced by the proportion of all grocery store workers unionized in the same metropolitan area. The study examined data for 73 metropolitan areas across the United States, using multiple regression analysis and controlling for numerous variables, including re-**[735]**gion of the country and city size. The study found that there is a positive and significant relationship between the average hourly earnings of

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[21]At the hearing, the General Counsel took the position that organizing expenses were not chargeable and that Locals 7 and 951 had violated Sec. 8(b)(1)(A) by charging objecting nonmembers for organizing expenses.

[22]When asked whether he and Dr. Voos agreed that there was "some nexus between the degree of organization and union wages," Dr. Reynolds replied, "Yes. It's not a fool's game. There's something here worth serious study. Yes."

represented grocery store employees and the proportion of grocery store employees under union representation in the same metropolitan area.

Dr. Voos' study states that this positive relationship is explained in theoretical economics literature on the basis that union bargaining power is enhanced and management is more willing to negotiate higher wage rates when more competitors are facing the same union costs. Additionally, a higher percentage organized increases the union wage by lowering the elasticity of labor demand. Dr. Craypo similarly explained that unions try to eliminate or at least minimize the differences in workers' terms and conditions of employment among employers who are in competition with each other and thus preclude such employers from competing on the basis of labor costs. The more successful a union is at organizing competing employers, the greater will be its bargaining power and thus its ability to obtain higher wage rates, according to Dr. Craypo.

The close link between represented employees' wages and the percentage of employees who are unionized was illustrated by numerous examples. Dr. Craypo and Local 7 Vice President Al Gollas both testified concerning the level of organization and wage rates in the meatpacking industry. During the period of 1945-1968, the meatpacking industry was 90 percent organized. Pattern bargaining was followed and employee wages and benefits were generally uniform throughout the industry. Subsequently, new, largely nonunion companies entered the industry, paying wages far below union wage rates. As the new firms expanded rapidly, the union could not maintain the prior wage levels at the unionized firms, which insisted on concessions so they could compete with the nonunion companies. This led to repeated concessionary contracts and a downward wage spiral during which the union was unable to maintain a wage floor. A number of the unionized firms went out of business or sold out to the newer companies, which

became dominant in the industry. Starting in the late 1980s, after the union had embarked on a major organizing effort and finally succeeded in bringing some of the newer firms' plants under collective-bargaining agreements, contractual wage levels finally stabilized and began to rise. In sum, when the percentage of the meatpacking industry that was organized decreased, wages of represented employees likewise decreased, and when major elements of the industry subsequently were organized, wages increased.[23]

Dr. Craypo and former Local 7 President Charles Mercer also testified concerning the relationship between union wage levels and percentage of unionized employees in the Denver area supermarket industry, where three unionized employers made up about 90 percent of that market. After a nonunion chain, Cub Foods, opened stores in Denver in 1987, the organized employers contended that they could not compete with Cub because their labor costs were much greater than those of Cub. Ultimately Local 7 agreed to a $1.45 per hour reduction in wages after the employees had struck over deeper, proposed wage cuts. Local 7 thereafter conducted a successful effort at organizing Cub, and in the subsequent contract negotiations in 1990, was able to gain wage increases from the unionized employers. Once again, the wage rates of union-represented employees were directly affected by the percentage of employees who were organized.

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[23]The rise of low-wage, nonunion firms in the meatpacking industry also affected employees in the retail supermarket industry. Meatpacking firms began offering prepackaged, precut "boxed beef," in which the final processing that traditionally had been done by meatcutters in retail stores was performed instead by meatpacking employees. Because the meatpacking employees' wages were so much lower than those of unionized retail meatcutters, food retailers began purchasing boxed beef from meatpackers, rather than having their own meatcutters perform this work.

Local 951 President Robert Potter testified concerning the local's bargaining relationship with Meijer, whose stores sell both food and mercantile (nonfood) products and are three to four times the size of a normal supermarket, employing about 700 employees each. He recounted that, under successive collective-bargaining agreements, Meijer's food clerks have continually received a higher hourly rate than mercantile clerks, even though their duties are largely identical. The reason for this disparity is that the mercantile industry in Michigan is only about 10 percent organized, while organization in the supermarket industry is substantially greater. Stressing the need for a "level playing field" with its competitors, Meijer has insisted on paying the mercantile clerks less than the food clerk rate because of the lower-wage, nonunion competition it faces in the mercantile industry. Thus, Meijer's clerks' wages have been directly affected by the difference in the levels of organization of Meijer's competitors in the two industries in which it operates.

Robert Bender, who served until 1992 as Local 7's Wyoming director, testified concerning Local 7's contract negotiations with various food retailers. Local 7 represents employees of Safeway and Albertson's in both Colorado and Wyoming, but the wage rates paid by these firms' Wyoming stores have consistently been significantly lower than those paid by the same company's stores in Colorado. Local 7 has repeatedly sought to have the Wyoming stores pay the Colorado rates, but both employers have refused, for the stated reason that the retail grocery industry in Wyoming is much less organized than it is in Colorado and, thus, **[736]**they have significant lower-wage, nonunion competition in Wyoming.

Indeed, employer demands for a "level playing field" with nonunion competitors who have lower labor costs are a recurring refrain in contract negotiations, according to testimony of both Local 7 and Local 951 negotiators. For example,

one employer told Local 7 negotiator Al Gollas, "I cannot pay any more than the nonunion competition. You guys need to go out and organize them and get their wages up. We don't mind paying the wages as long as everyone else is paying the same thing."

In sum, we find that Congress' intent as reflected in Section 1 of the Act, the knowledge and views of experts in the field of economics, and the evidence reviewed above all forcefully demonstrate that, under the National Labor Relations Act, organizing is both germane to a union's role as a collective- bargaining representative and can benefit all employees in a unit already represented by a union. Unions are able to negotiate higher wages for the employees they represent when the employees of employers in the same competitive market are organized, and unions are less able to do so when they are not organized. Thus, represented employees, whether or not they are members of the union that represents them, benefit, through the results of collective bargaining, from that union's organization of other employees and consequently, under *Beck*, may be charged their fair share of the union's organizing expenses. Accordingly, we adopt the judge's finding that Locals 7 and 951 did not violate Section 8(b)(1)(A) by charging objecting nonmembers for organizing expenses.

The Supreme Court's decision in *Ellis* does not preclude us from reaching this conclusion.[24] *Ellis* was an action by

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[24]Nor does the Court's later decision in *Beck*. That decision simply held that Sec. 2, Eleventh of the Railway Labor Act and Sec. 8(a)(3) of the NLRB are materially identical and must be interpreted identically to prohibit the collection of dues in excess of those necessary for performing the duties of an exclusive bargaining representative. 487 U.S. at 745, 752. But as Judge Posner noted in upholding our decision in *California Saw*, "*Beck* left unresolved the definition of [this] agency function" and "[a]ll the details necessary to make the rule of *Beck* operational were left to the Board." *Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998) (the task of

airline employees challenging fees charged by the union that represented their bargaining unit under the Railway Labor Act. As we held in *California Saw*, precedent under public sector labor law and the Railway Labor Act, although possibly providing useful guidance, is not binding in the context of the NLRA.[25] In this instance, we find that *Ellis*' rationale in holding organizing expenses nonchargeable is inapplicable to cases under the NLRA.

In finding that the union improperly charged objecting nonmembers for organizing expenses, the Court in *Ellis* principally relied on the legislative history of the 1951 amendment that added Section 2, Eleventh to the Railway Labor Act, permitting parties under that statute to enter into union-security agreements. The Court pointed to Brotherhood of Railway, Airline and Steamship Clerks (BRAC) President George Harrison's express disclaimer in congressional hearings that the union shop was sought to strengthen the bargaining power of unions. As the Court noted, "When asked if the union shop would 'strengthen your industry-wide bargaining as it presently exists in the railroad industry,' Harrison replied: 'I do not think it would affect the power of bargaining one way or the other.'"[26] The Court therefore concluded that Congress had not aimed to enhance organizing efforts by amending the Railway Labor Act to authorize the union shop. The Court further concluded that using dues exacted from an objecting employee to organize

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"crafting the rules for translating the generalities of the *Beck* decision" left to the Board). Our holding herein is an exercise of the function left open to us by *Beck* of defining the parameters of union expenditures lawfully chargeable to objectors.

[25]320 NLRB at 227.

[26]466 U.S. at 451 fn. 12.

outside the employee's bargaining unit could afford "only the most attenuated benefits"[27] to collective bargaining on behalf of that employee. Finally, the Court added that, as organizing outside the bargaining unit worked "only in the most distant way"[28] to benefit employees who were already organized, such organizing was not the sort of union-provided benefit that Congress had in mind in authorizing union security so that "free-riders" would be required to pay for the benefits that they received.

The legislative history of the Railway Labor Act regarding union security and organizing on which the Court relied is, however, wholly unlike that of the National Labor Relations Act regarding those subjects. The bill that became the Railway Labor Act, enacted in 1926, was "the product of negotiations between employers and employees."[29]

> [R]epresentatives of a great majority of all the employers and all the employees of one industry conferred...for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community.[30]

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[27]Id. at 452.

[28]Id. at 453.

[29]Railroad Labor Disputes: Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce," 69th Cong., 1st Sess. 198 (1926) (statement of D.R. Richberg).

[30]Id. See also *Machinists v. Street*, 367 U.S. 740, 758 (1961) (It is accurate to say that the railroads and the railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their

[737]Thus, the Railway Labor Act represented an agreement by management and labor on a system for resolving disputes between them in order to avoid interruption of rail service.

As stated by the Supreme Court four years after the Railway Labor Act was passed, its "major purpose . . . was to provide a machinery to prevent strikes." *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, 565 (1930). Specifically, the 1926 Act imposed on both employers and the authorized representatives of their employees the obligation "to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes with all expedition in conference" with each other. Id. at 567-568. In fact, the Court later observed that most of the Act's provisions are singularly devoted to carrying out this policy objective. *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 553 (1937).[31] Indeed, when the statutory purpose of avoiding industrial strife was viewed by Congress as being undermined by the railroads' creation and maintenance of "company unions," it undertook major revisions of the Act in 1934 "aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them." *Virginian Ry. Co.*, 300 U.S. at 548. See also *Machinists v. Street*, 367 U.S. at 759 ("A primary purpose

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agreement.)

[31]See e.g., Sec. 2, Second, Third and Sixth establishing steps for adjusting disputes in conference between the freely chosen representatives of the parties; Sec. 3 providing for submission of unsettled disputes to an adjustment board or to the National Mediation Board under Sec. 4; and Secs. 7, 8, and 9 providing for voluntary arbitration of disputes not settled pursuant to the above provisions.

of the major revisions made in 1934 was to strengthen the position of the labor organizations vis-a-vis the carriers, to the end of furthering the success of the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and effective labor organizations"). In short, the Railway Labor Act's "framework for fostering voluntary adjustments between the carriers and their employees in the interest of the efficient discharge by the carriers of their important functions with minimum disruption from labor strife *has no statutory parallel in other industry.*" *Street*, supra at 755. (Emphasis added.)

It is apparent from the foregoing that unlike the NLRA, the focus of the Railway Labor Act was not on organizing. When the Railway Labor Act was enacted in 1926, railroad employees were already substantially organized. Indeed, their unions negotiated with the railroads to formulate the bill that became the Railway Labor Act. Additionally, in 1951, when the Railway Labor Act was amended to permit the union shop, the railroad industry continued to be highly organized, as 75 to 80 percent of all railroad employees were union members at that time.[32] The unions' argument in favor of union-security agreements, which was decisive with Congress, was that the costs of operating the fully established collective-bargaining system then existing in the railroad and airline industries should be shared equally among the represented employees.[33]

In contrast to the Railway Labor Act, when the National Labor Relations Act was enacted, the industries that it covered were, in general, thinly organized, and one of the principal purposes of the Act was to foster organization. As discussed above, this purpose was clearly reflected in Section 1 of the

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[32]See *Machinists v. Street*, 367 U.S. at 762.

[33]Id. at 761-762.

Act.[34] Further, while union-security agreements were prohibited under the Railway Labor Act until, almost as an afterthought, that statute was amended to permit them in 1951,[35] the National Labor Relations Act from the outset explicitly permitted union-security agreements.[36] Thus, union security was an integral part of the National Labor Relations Act's statutory scheme which itself was designed to promote organization. Moreover, while the Taft-Hartley amendments of 1947 restricted union-security agreements to eliminate "the most serious abuses of compulsory unionism,"[37] the union shop was preserved. Indeed, the Taft-Hartley Congress' rejection of a proposal to prohibit industry-wide bargaining showed that the National Labor Relations Act's objective of fostering organizing across employer lines remained intact.

In sum, BRAC President Harrison's testimony on which *Ellis* relied that introduction of the union shop under the Railway Labor Act would not affect his union's bargaining power was entirely logical given the high level of organization and the mature collective-bargaining system in place in the railroad industry in 1951. That testimony is, however, entirely inapposite to the National Labor Relations Act, of which union security was from the outset an organic part.

Further, in *Ellis*, the court of appeals had found organizing expenses to be chargeable. The Supreme Court described the lower court's rationale as simply that "organizing efforts are

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[34]Indeed, the initial subject addressed by Sec. 1 is the "denial by some employers of the right of employees to organize."

[35]See *Machinists v. Street*, 367 U.S. at 750-764.

[36]See *NLRB v. General Motors Corp.*, 373 U.S. 734, 738-739 (1963).

[37]Id. at 740.

aimed toward a stronger union, which in turn would be more successful at the bargaining table."[38] It is this relationship between organizing and collective bargaining that the Court labeled an "attenuated connection."[39] It is also this relationship [738]to which the Court was referring when, later in its analysis, it stated that organizing workers outside of a bargaining unit could afford "only the most attenuated benefits"[40] to collective bargaining on behalf of that unit and, similarly, that organizing "only in the most distant way works to benefit those already paying dues."[41]

In contrast to the court of appeals in *Ellis*, we are not finding organizing expenses chargeable in the present case merely on a general notion that organizing makes a union stronger and a stronger union is a more successful bargainer. Rather, our finding is based on a more specific proposition—that there is a direct, positive relationship between the wage levels of union–represented employees and the level of organization of employees of employers in the same competitive market—and on academic research, empirical data, and specific evidence demonstrating that that proposition is accurate.[42] In *Ellis*, unlike here, no empirical evidence was

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[38]466 U.S. at 451; see *Ellis v. Railway Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982).

[39]466 U.S. at 451.

[40]Id. at 452.

[41]Id. at 453.

[42]Our dissenting colleague argues that the *efforts* to organize a competitor unit may not be successful, and even if successful, that would not necessarily lead to better conditions in the unionized unit. Our colleague misses our point. The issue is not whether the union will be successful. The

presented demonstrating either the relationship between the represented employees' wages and the level of organization of other employees or the link found by the court of appeals that organizing makes a union stronger and a stronger union is a more successful bargainer. Indeed, the district court in *Ellis* had decided the merits of the case, ruling against the union, on a motion for summary judgment.[43] Although the union submitted to the court an affidavit by former Secretary of Labor Willard Wirtz, it spoke only broadly concerning the general need for unions to organize the competitors of organized employers. Unlike the record here, the affidavit appeared neither to focus on the industry at issue nor to present any specific empirical evidence.[44] Moreover, in *Ellis*, no Railway Labor Act provision was cited indicating that furthering organizing was one of the underlying purposes of that statute, as no such provision exists. The applicable statute in the present case, however, the National Labor Relations Act, as discussed above, emphasizes the furthering of organization as one of its statutory purposes. In sum, for the foregoing reasons, we find that *Ellis*' conclusion that organizing expenses were not

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issue is whether its organizational efforts are germane to the interests of the unionized unit. We believe that they are germane, even though we (and the union) realize that *efforts* are not always successful. Some collective-bargaining agreements negotiated by unions are less than optimum but the expense of doing so is still chargeable.

[43]See *Ellis v. Railway Clerks*, 91 LRRM 2339 (S.D. Cal. 1976). A trial subsequently was held regarding damages. See 108 LRRM 2648 (S.D. Cal. 1980).

[44]See excerpt of Wirtz affidavit quoted in Brief for Respondents (Brotherhood of Railway, Airline and Steamship Clerks) at 39 fn. 24, *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), reprinted in BNA's Law Reprints, Labor Law Series, Vol. 17, No. 9, 1983/84 Term, *Ellis v. Railway Clerks* at 205.

chargeable to objecting employees under the Railway Labor Act was based on grounds wholly unrelated to the National Labor Relations Act. We find, accordingly, that applying that holding to cases under the National Labor Relations Act is not warranted.

B. Scope of the Dues Reimbursement Remedy

Local 1036 represents employees of certain California supermarkets and has been a party to a series of collective-bargaining agreements with Food Employers Council, Inc., a multiemployer bargaining association representing retail food market employers. The judge found, and we agree, that Local 1036 violated Section 8(b)(1)(A) of the Act by, among other things, notifying newly hired employees in its "welcoming" letter that they were required to become full members of Local 1036 as a condition of employment[45] and by failing to notify such employees, hired into the multiemployer unit from September 21, 1988, until after July 11, 1990, of their *General Motors*[46] right to remain nonmembers of the union and of nonmembers' *Beck*[47] rights, including the right to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such

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[45]Local 1036 excepts to the judge's finding that this welcoming letter was sent to all employees hired in the multiemployer unit from September 21, 1988, until after July 11, 1990. We find it appropriate to afford Local 1036 the opportunity which it seeks to demonstrate in compliance proceedings the point at which it ceased sending to newly hired employees a letter stating that they were required to become full members of Local 1036 as a condition of employment.

[46]*NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

[47]See fn. 2, above.

activities.[48] In his remedy, the judge ordered that only employees who had filed objections were entitled to reimbursement for dues or fees that were allocated to activities other than collective bargaining, contract administration, or grievance adjustment.[49]

The General Counsel and Charging Parties Mulder, Buck, Gibbons, and Hilton except to the judge's failure **[739]**to provide a reimbursement remedy for all employees whom Local 1036 unlawfully failed to inform of their rights to remain nonmembers and to limit their payment of dues and fees to moneys spent on activities germane to Local 1036's role as bargaining representative. We find merit in these exceptions. In *Rochester Mfg. Co.*, 323 NLRB 260 (1997), issued subsequent to the judge's decision herein, the Board prescribed the appropriate remedy for employees who, like those here, were unlawfully not informed of their *General Motors* and *Beck* rights. To reconstruct, so far as possible, the circumstances that

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[48]Other *Beck* rights of which Local 1036 failed to inform the employees were the right to be given sufficient information to enable employees to intelligently decide whether to object to paying for nonrepresentational activities and the right to be apprised of any internal union procedure for filing objections.

[49]Local 1036 excepts to the judge's failure to dismiss employee Nosek's unfair labor practice charge as untimely. The allegation in Nosek's charge that Local 1036 sought to have him discharged or laid off for reasons other than his failure to pay financial core dues is clearly timely, as it concerns matters that occurred less than a month before the charge was filed. We find it unnecessary to pass on the timeliness of the other allegations contained in the charge, as Charging Party Hilton's unfair labor practice charge against Local 1036, the timeliness of which is not in dispute, preceded Nosek's charge and presented allegations of the same character, and the remedies ordered for the violations found based on Hilton's charge encompass Nosek and are the same as those which would be ordered to remedy Nosek's allegations.

would have existed but for the union's unlawful conduct, the Board ordered the union to give such employees notice of their rights under *General Motors* and *Beck* and to process the objections of employees who, with reasonable promptness after receiving their notices, elected nonmember status and made *Beck* objections with respect to one or more accounting periods covered by the complaint. The Board further ordered the union to reimburse each such employee for the dues and fees expended for nonrepresentational activities that occurred during the accounting periods as to which the employee had objected. In accord with *Rochester Mfg.* and subsequent cases,[50] we shall modify the Order herein to conform with the remedy prescribed there. Specifically, we shall order Local 1036 to notify all bargaining unit employees of their rights under *Beck* and *General Motors*. The *Beck* notice shall contain sufficient information for each accounting period covered by the complaint to enable those employees to decide intelligently whether to object. See e.g., *California Saw*, supra, 320 NLRB at 233.

We shall order Local 1036 to notify in writing those employees whom they initially sought to obligate to pay dues or fees under the union-security clause on or after September 3, 1988, of their right to elect nonmember status and to make *Beck* objections with respect to one or more of the accounting periods covered by the complaint. With respect to any such employees who, with reasonable promptness after receiving their notices, elect nonmember status and file *Beck* objections with respect to any of those periods, we shall order that Local 1036, in the compliance stage of the proceeding, process their objections, nunc pro tunc, as they would otherwise have done, in accordance with the principles of *California Saw*. Local 1036 shall then be required to reimburse these objecting nonmember

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[50]See *Paperworkers Local 987 (Sun Chemical Corp.)*, 327 NLRB 1011 (1999); *Painters (Meiswinkel/RFJ, Inc.)*, 327 NLRB 1020 (1999).

employees for the reduction in their dues and fees, if any, for nonrepresentational activities that occurred during the accounting period or periods covered by the complaint in which they have objected.[51]

C. Other Remedial Issues

The judge ordered Locals 951 and 1036 to post at their union hall offices copies of notices to employees and members. He further ordered them to sign and return copies of the notices to the Regional Director for posting by the employers of the employees in the bargaining units at issue, if the employers are willing to do so. We are cognizant that many affected employees may never have occasion to visit the union hall offices and that some or all of the employers may not be willing to post the notices. We are also aware that unions, through practice or contractual right, often have access to bulletin boards in employers' facilities on which they post information that they wish to convey to the employees they represent. Therefore, to further the goal that all affected employees be made aware of

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[51]We shall confine the reimbursement remedy to employees who were initially subjected to union security on or after September 3, 1988, the beginning of the 6-month period preceding the filing and service of the charge. On the other hand, we shall order Local 1036 to give notices to all bargaining unit employees irrespective of when they were initially subjected to the union-security obligation. This remedial action is designed to ensure that all unit employees will have knowledge of their rights, for future exercise if they wish. The class to which notice is required is broader than the class for which make-whole relief is provided, consistent with the distinction made in Board practice between the obligation of a labor law violator to make whole victims of proven unfair labor practices and the violator's obligation to notify employees of the rights that were violated. See *Assn. for Retarded Citizens (Opportunities Unlimited)*, 327 NLRB 463, 466, at 4 fn. 14 (1999).

the contents of the Board notice relevant to them, we shall additionally order Locals 951 and 1036 to post the notices at all facilities of the employers in the bargaining units at issue herein at which the unions, by practice or contractual right, have access to bulletin boards for posting information.

In addition to posting the notices, the judge also ordered Local 1036 to mail copies of the notices to employees employed, or who received copies of the "welcoming" letter, on or after September 21, 1988. In view of the additional posting requirement that we have imposed, we shall modify the judge's order so that Local 1036 need not mail notices to employees who, at the time that Local 1036 properly posts the required notice on all bulletin boards at employers' facilities to which it has access for posting information, work in the bargaining unit at facilities where Local 1036 posts such notices.

Finally, we reject the contention of Charging Parties Mulder, Buck, Gibbons, and Hilton that the judge erred with respect to the remedies he gave for Local 951's unlawful conduct in filing and prosecuting a Federal court lawsuit seeking an order enforcing arbitration awards against Mulder, Buck, and Gibbons for their **[740]**unpaid dues.[52] In particular, they allege that he erred in failing to award them "reasonable expenses and legal fees" in defending against the lawsuit. We note that it is not the individual Charging Parties who seek reimbursement for such expenses, since it is undisputed that they incurred none. Rather it is the Charging Parties' attorney, employed by the National Right to Work Legal Defense and

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[52]These Charging Parties also except to the judge's failure to find the lawsuit unlawful on an additional "per se" theory. Since there were no exceptions to the judge's finding of a violation on the basis of the lawsuit, and since it would make no difference to the remedy whether we adopted the Charging Parties proposed "per se" theory, we find it unnecessary to pass on this exception.

Education Foundation, who seeks reimbursement for expenses and legal services which were provided under a "no fee" arrangement with the Charging Parties. The Foundation contends that "[j]ust as in the context of litigation under 42 U.S.C. 1988, the identity of the attorney or the fact that the litigant did not personally incur legal expenses —because those expenses were paid by a charitable organization—cannot be determinative" of its entitlement to an award of attorneys' fees.

We disagree. The National Labor Relations Act, which is essentially remedial, authorizes the Board to provide relief for actual losses of parties to our proceedings or those found to be victims of unfair labor practices. It is not aimed at compensating attorneys. By contrast, the attorney fee provision in 42 U.S.C. 1988, specifically authorizes Federal courts to award attorney's fees to prevailing parties in certain civil rights actions brought in Federal court. Although 42 U.S.C. 1988 has been construed, consistent with congressional intent to encourage the availability of competent counsel for plaintiffs in private civil rights suits, to allow entities like the Foundation to recover attorney fees in such suits regardless whether the plaintiffs themselves incurred those fees (see *Blanchard v. Bergeron*, 489 U.S. 87 (1989)), it does not apply to proceedings under the NLRA. Accordingly, the judge did not err in failing to provide for such recovery.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondent United Food and Commercial Workers Local 951, its officers, agents and representatives, shall

1. Cease and desist from

(a) Charging, collecting and retaining full membership dues from employees who elect not to become union members

and who object to paying dues or fees for activities other than collective bargaining, contract administration and grievance adjustment.

(b) Failing to disclose to objecting nonmembers the full amounts of expenditures for all activities which it conducts.

(c) Charging and continuing to collect from objecting nonmembers, as dues and fees paid pursuant to contractual union-security clauses, amounts which are remitted to United Food and Commercial Workers International Union, AFL-CIO, CLC, without disclosing to those objecting nonmembers how United Food and Commercial Workers International Union, AFL-CIO, CLC, allocates its expenditures between representation and nonrepresentation activities.

(d) Collecting and retaining previously collected dues and fees from objecting nonmembers which are attributable to nonchargeable lobbying expenses.

(e) Requiring objecting nonmembers to exhaust remedies provided by its Service Rebate Procedure "prior to seeking judicial review of any issue capable of resolution under" that Procedure.

(f) Filing and maintaining in United States District Court applications to confirm arbitration awards which are based upon actions which constitute a breach of Local 951's duty of fair representation owed objecting nonmembers.

(g) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Refund with interest to Philip G. Mulder, Charles Buck, Leon Gibbons and all other objecting nonmembers who objected on or after May 9, 1988, to the extent not already rebated, those portions of dues and fees allocable to lobbying and other nonrepresentational activities of Local 951 and, also,

to the extent that they have been remitted to United Food and Commercial Workers International Union, AFL-CIO, CLC, and are not shown to have been allocable to expenses of that labor organization for representation activities.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all dues payment records, escrow records, and all other records necessary to analyze the amounts of refunds due under the terms of this Order.

(c) Reimburse with interest any personal expenses incurred by Philip G. Mulder, Charles Buck, and Leon Gibbons for defending against the Application for Order Confirming an Arbitration Award filed against them in United States District Court for the Western District of Michigan on July 24, 1991.

(d) Remove from the Service Rebate Procedure the portion stating that "Any objecting nonmember must exhaust the remedies provided by this procedure prior to seeking judicial review of any issue capable of resolution under this procedure," and distribute to Mulder, **[741]**Buck, Gibbons and all other objecting nonmembers copies of the Service Rebate Procedure with that portion deleted.

(e) Within 14 days after service by the Region, post at its union hall offices and at all facilities of Meijer, Inc., at which it has access to bulletin boards for posting information, copies of the attached notice marked "Appendix A" and copies of the Service Rebate Procedure with the portion quoted above in Section 2(d) deleted.[53] Copies of the notice, on forms provided by the Regional Director for Region 16, after being

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[53]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signed by Respondent Local 951's authorized representative, shall be posted by Respondent Local 951 immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Sign and return to the Regional Director sufficient copies of the notice and the Service Rebate Procedure, with the portion quoted above in Section 2(d) deleted, for posting by Meijer, Inc., if willing, at all locations where notices to Meijer, Inc.'s employees are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to steps that Respondent Local 951 has taken to comply.

B. Respondent United Food and Commercial Workers Local 1036, its officers, agents and representatives, shall

1. Cease and desist from

(a) Failing and refusing to inform newly hired employees, when notifying them of their obligations under union-security clauses in collective-bargaining agreements to which Local 1036 is a party, that those employees have the right not to submit signed membership applications and not to perform any obligation of union membership other than the tender of periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in Local 1036.

(b) Failing to notify unit employees, when they first seek to obligate them to pay fees and dues under a union-security clause, of their right under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), to be and remain nonmembers and of the rights of nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for the Respondent's

nonrepresentational activities and to obtain a reduction dues and fees for such activities.

(c) Failing and refusing to inform employees who object to paying for union activities not germane to Local 1036's duties as bargaining agent and who elect to obtain a reduction in dues and fees for such activities, of the percentage of the reduction in dues and fees, the basis for the calculation, and that they have a right to challenge those figures.

(d) Charging and continuing to collect full membership dues from employees who elect not to become members of Local 1036 and who object to paying dues or fees for its activities which are not germane to its duties as bargaining agent.

(e) Retaining those portions of dues and fees paid by Glenn T. Hilton, John B. Nosek, and any other objecting nonmembers which are allocable to activities which are not germane to Local 1036's duties as bargaining agent and which were charged and collected after their objections to doing so had been received by Local 1036.

(f) Threatening to have discharged, or otherwise to interfere with the employment of, Glenn T. Hilton, John B. Nosek, or any other employee who has objected to becoming a union member and has elected not to pay dues or fees for activities not germane to Local 1036's duties as bargaining agent, if he or they do not continue submitting full membership dues following receipt of such objections.

(g) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify all bargaining unit employees in writing of their rights under *General Motors* to be and remain nonmembers and of the rights of nonmembers under *Beck* to object to

paying for nonrepresentational activities of the Union and to obtain a reduction in dues and fees for such activities. In addition, the notice must include sufficient information to enable the employees to intelligently decide whether to object, as well as a description of any internal union procedures for filing objections.

(b) For each accounting period since September 3, 1988, provide Glenn T. Hilton and John B. Nosek with information setting forth Respondent Local 1036's major categories of expenditures for the previous accounting year and distinguishing between representational and nonrepresentational functions.

(c) Notify in writing those employees whom Respondent Local 1036 initially sought to obligate to pay dues or fees under the union-security clause on or after September 3, 1988, of their right to elect nonmember status and to make *Beck* objections with respect to one **[742]**or more of the accounting periods covered by the complaint.

(d) With respect to any employees who, with reasonable promptness after receiving the notices prescribed in paragraph 2(c), elect nonmember status and file *Beck* objections, process their objections in the manner set forth in section B of this Decision.

(e) Reimburse, with interest, Hilton and Nosek and any other nonmember bargaining unit employees who file *Beck* objections with Respondent Local 1036 for any dues and fees exacted from them for nonrepresentational activities, in the manner set forth in section B of this Decision.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all records of employees to whom a "welcoming" letter has been sent and all records of objections to paying full membership dues which have been received since September 21, 1988, and all dues payment records and all other records necessary to analyze the amounts of refunds due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its union hall offices and at all facilities of Ralphs Grocery Company, Lucky Food Stores, and all other members of Food Employers Council, Inc., who have been parties to collective-bargaining agreements between Food Employers Council, Inc., and Local 1036 since September 21, 1988, at which it has access to bulletin boards for posting information, copies of the attached notice marked "Appendix B."[54] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent Local 1036's authorized representative, shall be posted by Respondent Local 1036 immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Sign and mail copies of the notice, at its own expense, to employees employed, or who received copies of the "welcoming" letter, on or after September 21, 1988, to the most recent addresses shown by Local 1036's records or to addresses supplied by the General Counsel's office, except that copies of the notice need not be mailed to employees who, at the time that Local 1036, as provided above, properly posts the required notice on all bulletin boards at employers' facilities to which it has access for posting information, work in the bargaining unit at facilities where Local 1036 posts such notices.

(i) Sign and return to the Regional Director sufficient copies of the notice for posting by Ralphs Grocery Company, Lucky Food Stores, and all other members of Food Employers Council, Inc., who have been parties to collective-bargaining agreements between Food Employers Council, Inc., and Local

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[54]See fn. 53, above.

1036 since September 21, 1988, if those employers are willing to do so, at all locations where notices to their employees are customarily posted.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to steps that Respondent Local 951 has taken to comply.

IT IS FURTHER ORDERED that the second consolidated amended complaint is dismissed insofar as it alleges violations of the Act by United Food and Commercial Workers Local 7, United Food and Commercial Workers Local 951, and by United Food and Commercial Workers Local 1036 not found here.

MEMBER BRAME, concurring in part and dissenting in part.

My colleagues' decision, while addressing primarily the issue of the chargeability of organizing expenses under *Communications Workers v. Beck*,[1] disposes of a number of complaint allegations concerning three different United Food and Commercial Workers (UFCW) Locals.

UFCW Local 1036 represents employees of certain California supermarkets and has been a party to a series of collective-bargaining agreements with Food Employers Council, Inc., a multiemployer bargaining association representing retail grocers. UFCW Local 951 represents Michigan employees of Meijer, Inc., a retailer of food and nonfood products, with which it has several collective-bargaining agreements. UFCW Local 7 represents employees of City Markets, a retail grocer, in four Colorado towns and also represents the Denver employees of Champion Boxed Beef.

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[1]487 U.S. 735 (1988).

Local 7 has collective-bargaining agreements with City Markets and Champion Boxed Beef.

At various times, certain employees of each of these employers notified their respective UFCW locals that they were resigning their union memberships and objected to paying for nonrepresentational activities. The complaint allegations in this case concern largely whether the three locals violated the *Beck* rights[2] of the employees in these bargaining units. For the reasons set forth below, I dissent from my colleagues' finding **[743]**that Locals 7 and 951 did not violate the Act by charging objecting nonmembers for organizing expenses. As indicated below, I also dissent from certain other findings but concur with my colleagues as to other issues.

1. I join my colleagues in adopting the judge's findings that Local 1036 violated Section 8(b)(1)(A) of the Act by: (1) notifying newly hired employees that they were required to become full members of Local 1036 as a condition of employment; (2) failing to notify such employees of their *General Motors*[3] right to remain nonmembers of the union and their

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[2]In *Beck*, the Supreme Court held that, although Sec. 8(a)(3) of the Act allows unions and employers to negotiate agreements providing that all unit employees shall pay dues and fees regardless of formal membership, a union lacks authority under Sec. 8(a)(3) to collect from objecting nonmembers fees and dues beyond those necessary for collective bargaining, contract administration, and grievance adjustment and breaches its duty of fair representation by expending such funds on activities unrelated to its role as the bargaining representative.

[3]*NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). In *General Motors*, the Supreme Court described an employee's membership obligation under a union-security clause permitted by the proviso to Sec. 8(a)(3) as "whittled down to its financial core." Id. at 742. Thus, it is the right of employees under *General Motors* to satisfy their obligations under a union-security clause by doing no more than paying the union an amount equivalent to union initiation fees and dues. They need not become union

Beck rights, including the right to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities;[4] (3) failing to provide objecting nonmembers with information concerning the amounts of dues reductions, the basis for those calculations, and their right to challenge those figures;[5] and (4) demanding continued payment of, and collecting, full membership dues from objecting nonmembers Hilton and Nosek and threatening discharge if they failed to comply with Local 1036's demand for payment of full membership dues.[6] I also agree with my

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members.

[4]In adopting this violation, I do not rely on the Board's decision in *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998). Rather, I rely on the Supreme Court's decisions in *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292 (1986), and *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998). See *Teamsters Local 75 (Schreiber Foods)*, 329 NLRB No. 12, slip op. at 8, fn. 10 and accompanying text (1999) (Member Brame, concurring in part, dissenting in part).

[5]In adopting this violation, I do not rely on the Board's decision in *California Saw & Knife Works*, supra. Rather, I rely on the Supreme Court's decision in *Chicago Teachers Union Local 1 v. Hudson*, supra. See *Teamsters Local 75 (Schreiber Foods)*, supra, slip op. at 10 (Member Brame, concurring in part, dissenting in part).

[6]In adopting these violations, I do not rely on the Board's decision in *California Saw & Knife Works*, supra. Rather, I find that, by engaging in this conduct, Local 1036 directly restrained and coerced employees in their Sec. 7 right to refrain from joining or assisting labor organizations. Thus, I find it unnecessary to consider whether Local 1036's actions violated the duty of fair representation here. Cf. *Polymark Corp.*, 329 NLRB No. 7, slip op. at 11, fn. 30 and accompanying text (1999) (Member Brame, concurring in part, dissenting in part).

colleagues' provision of a *Rochester Mfg. Co.*[7] remedy for all employees whom Local 1036 failed to inform of their rights. This remedy affords such employees the opportunity to elect nonmember status and make *Beck* objections with respect to any of the accounting periods covered by the complaint and receive reimbursement of their dues and fees, if any, that Local 1036 expended for nonrepresentational activities during such periods.

2. The judge found that Local 951 violated Section 8(b)(1)(A) by, among other things, failing to supply objecting nonmembers Mulder, Buck, and Gibbons with any information concerning the United Food and Commercial Workers International Union's expenditures of dues remitted to it by Local 951 and by requiring objecting nonmembers to exhaust their remedies under Local 951's Service Rebate Procedure prior to seeking judicial review of the expenditures that Local 951 deemed chargeable. No exceptions were filed to any of the judge's findings of violations by Local 951. Charging Parties Mulder, Buck, Gibbons, and Hilton, however, excepted to the judge's reasoning suggesting that Local 951 would not be obligated to provide information concerning the UFCW International Union's expenditures of dues forwarded to it if Local 951 did not possess such information.[8] Although my colleagues find it unnecessary to reach this issue, I specifically decline to adopt the judge's rationale. Local 951 clearly was obligated to provide information concerning how the dues it

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[7]323 NLRB 260 (1997).

[8]The judge subsequently observed that Local 951 did not contend that it had not received information about how the International spent its receipts. The judge ultimately found that the burden was on Local 951 to show that dues deemed chargeable had been spent for representational activities and that any uncertainty had to be resolved against Local 951.

forwarded to the International was spent,[9] and any failure by the International to provide such information to Local 951 would not have relieved the Local of this obligation.

I also dissent from my colleagues' dismissal of the complaint allegation that Local 951 violated Section 8(b)(1)(A) by requiring, under its Service Rebate Procedure, that nonmembers first file with Local 951's executive board any objections to Local 951's determination of the chargeable dues amount before presenting their objections to an arbitrator. The judge, as noted above, separately found that Local 951's Service Rebate Procedure violated Section 8(b)(1)(A) by requiring objecting nonmembers to exhaust their remedies under this procedure prior to seeking judicial review. The requirement that nonmembers file objections with Local 951's executive board was an integral part of the union's unlawful mandatory internal appeals procedure. Therefore, contrary to my colleagues, I would reverse the judge and find the requirement that nonmembers file objections with the union's executive board likewise unlawful. See *Teamsters Local 75 (Schreiber Foods)*, 329 NLRB No. 12, slip op. at 13-**[744]**14 (Member Brame, concurring in part, dissenting in part).[10]

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[9]See *Teamsters Local 75 (Schreiber Foods)*, supra, slip op. at 10, fn. 15 and accompanying text (Member Brame, concurring in part, dissenting in part).

[10] Additionally, contrary to my colleagues, I would set aside the judge's approval of a settlement agreement that disposed of the complaint allegations against United Food and Commercial Workers Local 7 other than the allegation concerning organizing expenses, and remand the applicable complaint allegations for hearing. In their exceptions, Charging Parties McReynolds and Kipp contend that the settlement agreement inadequately remedied allegations concerning chargeability of lobbying expenses, overhead expenses, and per capita tax. Having reviewed the settlement agreement, I find that McReynolds and Kipp's contentions have

3. Contrary to my colleagues, I would find that Respondents Locals 7 and 951 violated Section 8(b)(1)(A) of the Act by charging objecting nonmembers for organizing expenses. As I have previously indicated,[11] the issue of organizing expenses is, without question, controlled by the Supreme Court's decision in *Ellis v. Railway Clerks*.[12] In that case, the Court found that, under the Railway Labor Act, a union's expenditures for organizing were not chargeable to objecting employees. The Court set forth three reasons for its holding. First, the Court found no basis in the legislative history for the notion that, in authorizing the union shop, Congress aimed to enhance union organizational efforts.[13] Second, the Court recognized that, where a union shop provision is in place, the bargaining unit employees are already organized, so organizing expenses are necessarily spent on employees outside the unit, and the Court found that using dues to recruit members outside the unit "can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer."[14] Third, the Court reasoned that, as organizing "only in the most distant way works to the benefit of those already paying dues,"[15] organizing was not the sort of benefit that Congress had in mind in

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merit.

[11]See *Teamsters Local 75 (Schreiber Foods)*, supra, slip op. at 13, fn. 38 and accompanying text (Member Brame, concurring in part, dissenting in part).

[12] 466 U.S. 435 (1984).

[13]Id. at 451-452.

[14]Id. at 452.

[15]Id. at 453.

authorizing union security to prevent "free riders" from enjoying benefits obtained by the union for which they had not paid.

These reasons apply with equal force to union security under the National Labor Relations Act. Regarding legislative history, there is nothing to indicate that Congress' purpose in permitting union-security agreements under either the National Labor Relations Act or the Railway Labor Act was to promote organizing. As the Court explained in *Beck*,[16] the 1947 Taft-Hartley amendments that produced Section 8(a)(3) of the National Labor Relations Act were tailored to abolish the closed shop while still permitting parties to enter into union-security provisions to prevent "free riders" from receiving the benefits of union representation without paying for them. Four years later, partially in response to demands for parity from unions subject to the Railway Labor Act, Congress extended the same right to parties under that statute by the addition of Section 2, Eleventh to the Railway Labor Act. Thus, the purpose of allowing union-security agreements under each statute was the same — to prevent "free riders," not to promote union organizing.

The Court's other reasons in *Ellis* for finding organizing expenses nonchargeable are similarly applicable to the National Labor Relations Act. It is equally true under the National Labor Relations Act as under the Railway Labor Act that where a union shop provision is in place, the unit employees are already organized, so organizing expenses are necessarily spent on employees outside the unit. Thus, the Court's finding in *Ellis* that using dues to recruit members outside the unit "can afford only the most attenuated benefits to collective bargaining on

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[16]487 U.S. at 746-754.

behalf of the dues payer,"[17] also applies under National Labor Relations Act. Also applicable is the Court's finding that organizing was not the sort of benefit that Congress had in mind when it authorized union security to assure that employees would pay for the union-provided benefits that they received. Thus, *Ellis*' reasoning in finding organizing expenses nonchargeable under the Railway Labor Act applies similarly to the National Labor Relations Act, and its conclusion that organizing expenses are nonchargeable must also govern under the National Labor Relations Act.

Any lingering doubt that *Ellis*' holding organizing expenses nonchargeable applies to the National Labor Relations Act was eliminated by the Court's subsequent decision in *Beck*.[18] In that case, the Court found the provisions of the Railway Labor Act and those of the National Labor Relations Act that authorized union-security agreements, Section 2, Eleventh and Section 8(a)(3) respectively, to be "in all material respects identical."[19] The Court explained that "in amending the RLA in 1951, Congress expressly modeled Section 2, Eleventh on Section 8(a)(3), which it had added to the NLRA only four years earlier."[20] Consequently, the Court concluded: "In these circumstances, we think it clear that Congress intended the same language to have the same meaning in both statutes."[21]

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[17]466 U.S. at 452.

[18]Supra.

[19]487 U.S. at 745.

[20]Id. at 746.

[21]Id. at 746-747.

Thus, the Court in *Ellis* found that under Section 2, **[745]**Eleventh of the Railway Labor Act organizing expenses are not chargeable to objectors, and the Court in *Beck* found that Section 8(a)(3) of the National Labor Relations Act has the same meaning as Section 2, Eleventh of the Railway Labor Act. Taken together, these holdings compel the conclusion that under Section 8(a)(3) of the National Labor Relations Act organizing expenses are not chargeable, as such expenses are not chargeable under Section 2, Eleventh of the Railway Labor Act, whose meaning the Court has found to be the same as that of Section 8(a)(3). Consequently, in my view, Supreme Court precedent mandates the conclusion that organizing expenses, as a matter of law, are not chargeable to objecting nonmembers under the National Labor Relations Act.

The majority contends that a different interpretation is warranted because of the different legislative history of union-security provisions under the National Labor Relations Act than under the Railway Labor Act. They argue that, unlike the Railway Labor Act, union-security provisions were permitted under the National Labor Relations Act from its inception and that facilitating organizing was more directly a purpose in enacting the National Labor Relations Act than it was in enacting the Railway Labor Act. Assuming that these contentions are correct, they are irrelevant. The right of employees to organize is protected under both statutes.[22]

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[22]Compare Sec. 2, Fourth of the Railway Labor Act ("Employees shall have the right to organize and bargain collectively through representatives of their own choosing. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees.") with Sec. 7 of the National Labor Relations Act ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of

More importantly, as discussed above, there is nothing to indicate that Congress' purpose in allowing union-security agreements under either statute was to promote organizing. It is simply too late in the day to contend that a different interpretation is warranted based on Section 8(a)(3)'s legislative history. That argument is foreclosed by *Beck's* holding that Section 8(a)(3) of the National Labor Relations Act has the same meaning as Section 2, Eleventh of the Railway Labor Act.[23]

In any event, even assuming arguendo that *Ellis* and *Beck* do not establish that organizing expenses are nonchargeable as a matter of law, the Respondents' evidence falls well short of demonstrating as a factual matter that organizing efforts afford anything more than "only the most attenuated benefits"[24] to collective bargaining on behalf of employees who are already organized. That there may be some statistical correlation between the percentage of employees who are organized and wage levels of represented employees fails to establish a cause and effect relationship, and the Respondents' selectively chosen anecdotal evidence adds nothing.

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their own choosing ").

[23]It is true, as the majority notes, that the Seventh Circuit has stated that "*Beck* left unresolved the definition of the agency function ." and that "[a]ll the details necessary to make the rule of *Beck* operational were left to the Board ." *Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998). As the issue of the chargeability of organizing expenses, however, has already been decided by the Supreme Court in *Ellis*, this issue hardly falls within the category of unresolved matters or "details" contemplated by the Seventh Circuit as left for determination by the Board.

[24]*Ellis*, 466 U.S. at 452.

Moreover, the majority assumes without supporting evidence myriad necessary steps in the asserted relationship between expenditures for organizing and the wages paid to already-represented employees. For example, they ignore the fact that not all organizing activities lead to voluntary recognition or elections and that, even when elections are held, unions win only about half.[25] Additionally, as reported Board cases show, not all election wins result in contracts, and not all contracts provide for increased wages.[26] Further, not all increased wages at a newly organized employer result in higher wages at its already-unionized competitor. The effect on the competitor depends, among many other things, on the level of unemployment in the market, the size of the organized employers relative to the total labor market serving the organized employers, the elasticity of demand for the end products, availability and cost of labor saving devices, and the elasticities of the other productive factors.[27] Each step in this sequence requires detailed factual analysis. (See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, §§1.1 ["Product Market Definition"] and 1.2 ["Geographic Market Definition"] [1992], for examples of the analyses necessary to determine such foundational matters as product and geographic markets.) In addition, the effect may also depend on the terms of existing collective-bargaining agreements, for, under any assumptions, employees working under a three year, no-reopen-

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[25]See Sixty-Third Annual Report of the National Labor Relations Board, 1998, 12 (unions won 48.9 percent of elections conducted by the Board in fiscal year 1998).

[26]See, e.g., *MGM Grand Hotel*, 329 NLRB No. 50 (1999).

[27]See, generally, Clark Kerr, "The Impacts of Unions on the Level of Wages," in C. A. Meyers (Ed.), *Wages, Prices, Profits, and Productivity* (1959) and George Stigler, *The Theory of Price* c. 16 (3rd ed. 1966).

er contract could see no benefit of a competitor's being organized until the contract was renewed.[28] Given the many steps of causation necessary for organizing efforts to increase the wages of already organized employees, it is no wonder that the Supreme Court in *Ellis* found that organizing "only in the most distant way works to the benefit of those already paying dues"[29] and "can afford only **[746]**the most attenuated benefits to collective bargaining on behalf of the dues payer."[30]

In sum, I find that, as a matter of law, organizing expenses are nonchargeable to objecting nonmembers and, in any event, the Respondents have failed to demonstrate as a factual matter that expenditures on organizing benefit employees who are already represented. Accordingly, I dissent from my colleagues' finding that Locals 7 and 951 did not violate Section 8(b)(1)(A) of the Act by charging objecting nonmembers for organizing expenses.

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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[28]Indeed, the record is devoid of facts and analysis to establish that organizing expenditures charged to the Charging Parties actually produced any benefits for the employees who were already represented.

[29]466 U.S. at 453.

[30]Id. at 452.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT charge, collect and retain full membership dues from employees who elect not to become union members and who object to paying dues or fees for our activities other than collective bargaining, contract administration and grievance adjustment.

WE WILL NOT fail to disclose to objecting nonmembers the full amounts of expenditures for all our activities.

WE WILL NOT charge and continuing collecting from objecting nonmembers, as dues and fees paid pursuant to contractual union-security clauses, amounts which are remitted to United Food and Commercial Workers International Union, AFL-CIO, CLC, unless we disclose to those objecting nonmembers how United Food and Commercial Workers International Union, AFL-CIO, CLC, allocates its expenditures between representation and nonrepresentation activities.

WE WILL NOT collect or retain previously collected dues and fees from objecting nonmembers which are attributable to nonchargeable lobbying expenses.

WE WILL NOT require objecting nonmembers to exhaust remedies provided by our Service Rebate Procedure "prior to seeking judicial review of any issue capable of resolution under" that Service Rebate Procedure.

WE WILL NOT file and maintain in United States District Court applications to confirm arbitration awards which are based upon actions that constitute a breach of our duty of fair representation owed objecting nonmembers.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of rights guaranteed you by the National Labor Relations Act.

WE WILL refund with interest to Philip G. Mulder, Charles Buck, Leon Gibbons and all other objecting nonmem-

bers whose objections were received on or after May 9, 1988, to the extent not already rebated, those portions of dues and fees allocable to our lobbying and other nonrepresentational activities and, also, portions of those dues and fees that have been remitted to United Food and Commercial Workers International Union, AFL-CIO, CLC, and not shown to have been allocable to its representation activities.

WE WILL reimburse with interest any personal expenses incurred by Philip G. Mulder, Charles Buck and Leon Gibbons for defending against our Application for Order Confirming an Arbitration Award filed against them in United States District Court for the Western District of Michigan on July 24, 1991.

WE WILL remove from the Service Rebate Procedure the portion stating that "Any objecting nonmember must exhaust the remedies provided by this procedure prior to seeking judicial review of any issue capable of resolution under this procedure," and distribute to Philip G. Mulder, Charles Buck and Leon Gibbons and all other objecting nonmembers copies of the Service Rebate Procedure with that portion deleted.

UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 951

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to notify unit employees, when we first seek to obligate them to pay dues and fees under a union-security clause, of their right under *NLRB v. General*

Motors Corp., 373 U.S. 734 (1963), to be and remain nonmembers, and of the rights of nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for our nonrepresentational activities and to obtain a reduction in dues and fees for such activities.

WE WILL NOT fail to provide unit employees who have resigned their union memberships and filed *Beck* objections with information about the percentage reduction in dues and fees charged *Beck* objectors, the basis for that calculation, and the right to challenge those figures.

WE WILL NOT charge nonmember bargaining unit employees for nonrepresentational activities after they file *Beck* objections.

[747]WE WILL NOT threaten to have discharged, or otherwise to interfere with the employment of, Glenn T. Hilton, John B. Nosek or any other nonmember who objects, or has objected, to paying for activities not germane to our bargaining agent duties, unless such employee continues to pay full membership dues.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of rights guaranteed to you by Section 7 of the National Labor Relations Act.

WE WILL notify all bargaining unit employees in writing of their right under *General Motors* to be and remain nonmembers and of the rights of nonmembers under *Beck* to object to paying for our nonrepresentational activities and to obtain a reduction in dues and fees for such activities. In addition, the notice will include sufficient information to enable the employees to intelligently decide whether to object, as well as a description of any internal union procedures for filing objections.

WE WILL, for each accounting period since September 3, 1988, provide Hilton and Nosek with information setting forth our major categories of expenditures for the previous

accounting year and distinguishing between representational and nonrepresentational functions.

WE WILL notify in writing those employees whom we initially sought to obligate to pay dues or fees under the union-security clause on or after September 3, 1988, of their right to elect nonmember status and to make *Beck* objections with respect to one or more of the accounting periods covered by the complaint.

WE WILL process the *Beck* objections of any employees whom we initially sought to obligate to pay dues or fees under the union-security clause on or after September 3, 1988 who elect nonmember status and file objections with reasonable promptness after receiving notice of their right to so object.

WE WILL reimburse, with interest, Hilton and Nosek and any other nonmember bargaining unit employees who file *Beck* objections with us for any dues and fees exacted from them for nonrepresentational activities, for each accounting period since September 3, 1988.

UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 1036

APPENDIX G

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

January 31, 1997

DECISION OF THE ADMINISTRATIVE LAW JUDGE
[January 31, 1997]

[329 N.L.R.B. 747]
STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. This matter was remanded by the Board for issuance of a supplemental decision in light of its decision in *California Saw & Knife Works*, 320 NLRB 224 (1995). The hearing was conducted on various dates between January 14 and August 28, 1992. The record ultimately was closed on May 16, 1994. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs in light of the remand. Based upon the entire record, upon the briefs which were filed on behalf of the parties, and upon my observation of the demeanor of the witnesses, I hereby issue the following findings of fact and conclusions of law.

I. INTRODUCTION

The first proviso to Section 8(a)(3) of the National Labor Relations Act (the Act), allows employers and labor organizations to enter into agreements which "require as a condition of employment membership [in a labor organization] on or after the thirtieth day following the beginning of ... employment or the effective date of such agreement, whichever is the later." However, that allowance cannot be read in isolation.

"Full union membership ... no longer can be a requirement." *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95, 106 (1985). With respect to the first proviso to Section 8(a)(3) of the Act, "membership, insofar as it has significance to employment rights, may in turn be conditioned

only upon payment of fees and dues. Membership as a condition of employment is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Furthermore, that proviso "authorizes exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues.'" *Communications Workers v. Beck*, 487 U.S. 735, 762-763 (1988) (quoting from *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984).) More specifically, the proviso "does not permit a collective-bargaining representative, over the objection of dues-paying nonmember employees, to expend funds collected under a union-security agreement on activities unrelated to collective bargaining, contract administration, or grievance adjustment." *California Saw*, supra, 320 NLRB at 224.

As a result of settlement agreements which disposed of a number of unfair labor practice charges and some respondents, remaining for consideration in this consolidated proceeding are issues which extend across the spectrum of the duty of fair representation, Id. at 228-230, owed to employees as a consequence of union-security provisions negotiated by three local unions chartered by and affiliated with United Food and Commercial Workers, AFL-CIO, CLC (International), a labor organization within the meaning of Section 2(5) of the Act. Those three local unions are United Food **[748]**and Commercial Workers Local 7, which represents Colorado and Wyoming grocery store and meatpacking industry employees; United Food and Commercial Workers Local 951, which represents Michigan retail, grocery and mercantile employees, as well as employees working at a food processing plant, a nursing home, a pet food processing plant and certain distribution centers; and, United Food and Commercial Workers Local 1036, which represents, at least, retail food market industry employees working in Simi Valley and Thousand Oaks, California. Each

of those three local unions is a labor organization within the meaning of Section 2(5) of the Act.

The Second Consolidated Amended Complaint, as further amended, alleges that Local 951 violated the Act by including lobbying as a item for which it continued to charge employee-nonmembers who objected to continuing being charged, under union-security provisions, for union expenditures other than for collective bargaining, contract administration and grievance adjustment. Moreover, both Local 7 and Local 951 are alleged to have violated the Act by continuing to charge such objectors for expenditures made to organize other employees.

With respect to procedures followed under contractual union-security provisions at the threshold of the employment relationship, it is alleged that Local 1036 violated the Act by informing newly hired employees, covered by such provisions in successive collective-bargaining contracts with a multiemployer bargaining association, that they were required as a condition of employment to file membership applications with, and become members of, Local 1036. It is alleged that Local 1036 further violated the Act by failing to affirmatively inform those employees of their right to refrain from becoming union members and, further, of what is referred to as their *Beck* rights.

Several allegations arise from events occurring when certain employees did object to paying amounts that would finance union activities other than collective bargaining, contract administration, and grievance adjustment. Thus, it is alleged that Local 1036 violated the Act by continuing to charge and collect full dues from employee Glenn T. Hilton after he objected and, by threatening him with discharge if he failed to continue paying full dues. Local 951 is alleged to have violated the Act by continuing to charge and collect from objectors amounts equivalent to full membership dues, though those

amounts are placed in escrow and portions allocable to non-representation expenditures are returned periodically to objectors after the actual expenditures have been made, under what is referred to as a "charge and rebate system." Local 951 also is alleged to have violated the Act by failing to fully disclose to objectors whether its expenditures had been made for to collective bargaining, contract administration and grievance adjustment, or had been made for other purposes.

Moving to the next stage of that process, it is alleged that Local 951 violated the Act by requiring objectors to file their objections with its executive board before presenting their challenges to an arbitrator. It is further alleged that Local 951 violated the Act by requiring objectors to exhaust those internal procedures before filing a charge with the Board concerning their objections. Finally, Local 951 is alleged to have violated the Act by filing an application in United States District Court to confirm an arbitration award against three employees.

II. ALLEGATIONS AGAINST UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1036

Local 1036 has been party to a series of collective-bargaining contracts with Food Employers Council, Inc., a multiemployer bargaining association admitting to membership employers in the retail food market industry, and existing in part for the purposes of negotiating, executing and administering collective-bargaining contracts on behalf of those employer-members. Two of its employer-members are Ralph's Grocery Company (Ralph's) and Lucky Food Stores (Lucky).

Ralph's is a Delaware corporation with an office and place of business in Simi Valley, where it engages in operation of retail supermarkets. In the course and conduct of those business operations during a concededly representative period,

the 12-month period preceding execution by the appropriate parties of a Stipulation of Facts submitted on March 7, 1994, Ralph's derived gross revenues in excess of $500,000 and, further, purchased goods and materials valued in excess of $5000 which Ralph's received at Simi Valley directly from points outside of California. Therefore, Ralph's is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

Lucky also is a Delaware corporation engaged in the retail grocery business. One place that it does so is at an office and place of business in Thousand Oaks, California. In the course and conduct of business operations during the same representative period described above, Lucky derived gross revenues in excess of $500,000 and, further, purchased goods and materials valued in excess of $5000 which it received at Thousand Oaks directly from points outside of California. Therefore, Lucky is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Local 1036 and Food Employers Council, Inc. have negotiated a series of collective-bargaining contracts covering employees of employers—including Ralph's in Simi Valley and Lucky in Thousand Oaks—in the retail food market industry. As of the time of the hearing, the two most recent contracts had been effective by their terms from August 3, 1987 to and including July 29, 1990, and from July 30, 1990 to and including October 3, 1993. As a result, by virtue of Section 9(a) of the Act, Local 1036 had been the exclusive representative of employees in a multiemployer bargaining unit, including employees of Ralph's in Simi Valley and employees of Lucky in Thousand Oaks, covered by those contracts for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The union-security provisions of both most recent contracts, article 2, subsection A, requires that,

> All employees shall, as a condition of employment, pay to the Union the initiation fees and/or reinstatement fees and periodic dues lawfully required by the Union. This obligation shall commence on the thirty-first (31st) day following the date of employment by the Employer who is signatory to this Agreement, or the effective date of this Agreement, or the date of signature, whichever is later.

[749]Succeeding subsections of article 2 require signatory employers, such as Ralph's and Lucky, to submit to Local 1036 the names and addresses of newly hired unit employees, provide that Local 1036 will send an introductory letter to each new hire in which the above-quoted union-security provision will be recited, and specify that delinquent employees will be sent a notice of delinquency which states, "The penalty for noncompliance, i.e., discharge if the obligation has not been met," with termination notices to be sent to those delinquent employees who have "ignored all efforts by the Union to obtain compliance," as well as to the employers of those delinquent employees.

To implement article 2, Local 1036 formulated a "welcoming" letter which stated, inter alia, that, "as a condition of employment," the employee-addressee is required to become a member of Local 1036 on the 31st day following the date of employment and, to satisfy that obligation, must file a membership application, along with a tender of initiation fee, other mandatory fees, and dues and/or fees for the current period. The letter does not inform newly hired employees that the union security obligation can be satisfied by, as an alternative to becoming a member, tendering periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in Local 1036. Nor does the letter notify those employees that, should they desire not to become members of Local 1036, they have a right to object to paying for union

activities not germane to Local 1036's duties as bargaining agent and to obtain a reduction in fees for such activities, a right to be given sufficient information to enable them to intelligently decide whether to object, and a right to be apprised of any internal union procedures for filing objections. Such letters, or similarly worded ones, were sent by Local 1036 to all employees hired into the multiemployer contract unit during the period from September 21, 1988 until after July 11, 1990. The uncertainty concerning a concluding date is occasioned by Local 1036's assertion that it has no records showing when it had ceased sending such letters, nor had it retained records showing names of employees to whom its welcoming letter had been sent.

The General Counsel argues, though not necessarily with consistency, that the welcoming letter violated the Act in two respects. Appended to his brief in response to the remand, Counsel for the General Counsel attached has exceptions and brief to the Board, filed in April of 1995. In the brief in response to the remand, he "directs [my] attention to the 'ISSUES' section of his brief to the Board for a listing of the identified issues in this matter." That section of the brief to the Board identifies as issues, in connection with the welcoming letter, breach of Local 1036's "duty of fair representation in violation of Section 8(b)(1)(A) of the Act by failing to inform nonmembers of their rights under *CWA v. Beck*." The second issue is stated to be: "I. Whether Respondent UFCW Local 1036 breached its duty of fair representation and caused or attempted to cause various employer-members of Food Employers' [sic] Council, Inc. to discriminate against newly hired employees in violation of Section 8(b)(1)(A) and (2) of the Act by erroneously informing them that they were required as a condition of employment to join Local 1036."

The corresponding heading for that second issue in the "ANALYSIS AND ARGUMENT" section of both the brief to

the Board and in the remand brief, however, drops any mention of the "caused or attempted to cause various employer-members of the Food Employers' Council, Inc. to discriminate against newly hired employees" language, but retains the contention that Local 1036 violated Section 8(b)(2) of the Act: **"2. Local 1036 violated Section 8(b)(1)(A) and (2) of the Act by erroneously informing all newly hired employees in a multiemployer bargaining unit that they were required as a condition of employment to join the Union."** Still, the argument under that heading, neither in the brief to the Board nor the remand brief, makes no argument that Section 8(b)(2) of the Act had been violated by issuing the welcoming letter to newly hired employees.

Instead, for example in the remand brief, Counsel for the General Counsel argues only that the "information, which was disseminated via a so-called 'welcoming letter', coerced employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act," and, further, "that Local 1036's unambiguous requirement that employees become members by activating their membership through the submission of an application for membership as well as the payment of initiation fees along with other mandatory fees violated Section 8(b)(1)(A) of the Act."

As to Section 8(b)(1)(A) of the Act, it is long settled that "notification to new employees that they were required to become full members of [a labor organization] as a condition of their employment constitutes a violation of Section 8(b)(1)(A)." *Service Employees, Local 680 (Leland Stanford Junior University)*, 232 NLRB 326, 326 (1977). As Judge Shapiro explained in his underlying Decision, notification to newly hired employees that they must, inter alia, file a membership application as a condition of employment "constituted an implied threat of reprisal calculated to interfere with the employees' statutory right to refrain from any and all union activities," (footnote

omitted) and, consequently, "tended to restrain and coerce employees in their statutory right to refrain from abiding by union membership conditions." (supra at 329.)

The same situation is presented with respect to Local 1036's welcoming letter. It informed newly hired employees of the existence of the contractual union-security provision and that the employees must file membership applications, along with tendering money to satisfy the financial obligations, to become members. It warned that such actions were required "as a condition of employment[.]" There is no mention in the letter of tendering only uniformly required dues and fees, without having to become a member of Local 1036 and without having to observe other union-imposed obligations, as an alternative to full membership. Therefore, by only notifying newly hired employees in the multiemployer bargaining unit "that they were required to become full members...as a condition of their employment," Id., Local 1036 violated Section 8(b)(1)(A), but not Section 8(b)(2), of the Act.

In *California Saw*, supra, the Board concluded that labor organizations must, inter alia, take "reasonable steps to insure that all employees whom the union seeks to obligate to pay dues are given notice of their [*Beck*] rights." (supra at 233.) More specifically, whenever a labor organization seeks to obligate an employee to pay dues, that labor organi-**[750]**zation must take reasonable steps not only to notify that employee of the right to remain a nonmember, but also

> that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. [supra at 233.]

It is undisputed that Local 1036 never provided such notice to any of the employees hired into the multiemployer bargaining unit from September 21, 1988 until after July 11, 1990. In fact, there is no contention by Local 1036 that it ever thereafter provided such notice to newly hired employees when it sought to obligate them to pay dues. Therefore, by failing to do so, Local 1036 violated Section 8(b)(1)(A), but not Section 8(b)(2), of the Act.

To remedy the foregoing violations, Local 1036 shall be directed to cease and desist notifying employees in the unit encompassed by its collective-bargaining contracts with Food Employers Council, Inc. that they are required to file a membership application and become members of Local 1036 as a condition of employment, or that they are required to perform any obligation of union membership other than the tender of the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in Local 1036. Affirmatively, Local 1036 shall be ordered to notify all employees to whom a "welcoming" letter was sent on and after September 21, 1988, notice of their statutory right to refrain from becoming and remaining a member of Local 1036 and to refrain from performing any obligation of union membership other than tendering periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in Local 1036. With respect to the latter, Local 1036 shall further be ordered to notify each of those employees, that he/she has the rights quoted above from *California Saw*.

As stated above, Local 1036 claimed that it had no records showing names of employees to whom its welcoming letter had been sent. However, two of those employees are charging parties in this proceeding. One is Glenn T. Hilton, who filed the unfair labor practice charge in what has become Case 16-CB-3850-25 on March 3, 1989. The other is John B. Nosek, who filed the charge in what has become Case 16-CB-3850-27

on April 11, 1991. Hilton began working for Ralph's in the multiemployer bargaining unit on August 15, 1988. Nosek commenced work for Lucky in that unit in June of 1990. Hilton received a welcoming letter dated September 21, 1988; Nosek received one dated July 11, 1990.

It is undisputed that Local 1036 eventually received notices from Hilton and from Nosek, in essence, stating that neither man desired to be other than a "financial core" member. In his brief to the Board in support of his exceptions, Counsel for the General Counsel concludes his "**STATEMENT OF FACTS**" pertaining to Local 1036 by stating:

> In response, Local 1036 advised, **inter alia**, that it would seek Hilton's termination if he took any "unilateral" action with respect to his dues payment. (G.C. Exh. 1036/8). Moreover, in spite of Hilton's objection to paying for the nonrepresentational activities of Local 1036, the Local continued to charge him full Union dues, including amounts for nonrepresentational activities. (Tr. 509-510.)

So far as it goes, that is an accurate recitation. But, it omits certain other facts pertaining to Hilton and omits altogether Local 1036's reaction to Nosek's notice.

In his letter to Local 1036, dated November 28, 1988, Hilton requested a current accounting statement of dues expenditures so that he could determine the amount which he should pay for collective bargaining. He was informed, by letter from Local 1036's president dated December 21, 1988, that the local was "auditing its records to determine the dues and fees a financial core member is obligated to pay," and that he would be provided with that information "by separate cover." In the meantime, continues the letter, Hilton would be afforded "the opportunity to appeal ... through internal administrative procedures" Local 1036's determination regarding his financial obligations.

On March 23, 1989, Local 1036's counsel advised Hilton, inter alia, that, "The Union is in the process of completing its audit and will advise you when it has been completed." By letter dated April 25, 1989, counsel notified Hilton that the audit had been completed, but Local 1036 "believes that it needs some additional time to refine that audit to make sure it is entirely correct."

That April letter does assert that "somewhat less than 5% of its expenses are non-chargeable," and offers "to refund to you 5% of the dues which you have paid since you filed your objections," adding that Local 1036 will "retain in an escrow account an additional 5% to make sure that if any of the amounts you have paid in excess of 5% turn out to be non-chargeable, those amounts are not used for non-changeable activities." But, that April 25, 1989 letter provided Hilton with no breakdown of Local 1036's financial expenditures into chargeable and non-chargeable categories. And Local 1036 continued to charge Hilton full membership dues.

After receiving his welcoming letter dated July 11, 1990, Nosek requested, but never received by the time that he filed his above-mentioned unfair labor practice charge, information concerning the percentage of funds spent during the last accounting year for nonrepresentational activities. In fact, there is a stipulation that no unit employee hired since September 3, 1988, had been provided with such information. Nor were Hilton, Nosek or any other unit employee hired since then provided with a statement that nonmembers could object to having their union security payments spent on nonrepresentation or non-chargeable activities, a statement that an objector will be charged only for representation or chargeable activities, nor a statement that an objector will be provided with detailed information concerning the breakdown between representation or chargeable activities, on the one hand, and nonrepresentation or nonchargeable activities, on the other.

Notwithstanding the foregoing stipulation, the record does reveal that Nosek did receive notice, by letter dated March 2, 1992, that, as a result of an audit for calendar year 1988, Local 1036 had determined that nonchargeable expenses amounted to 6.98% of its expenditures for that year. That letter also asserted generally "that there has been no change in this figure for 1989, 1990 and 1991." An attached audit for calendar year 1988 consisted of a list of items with a "% NONRETAINABLE TO TOTAL EXPENSE" figure opposite **[751]**each listed item. No similar lists were supplied to Nosek for years after 1988.

Local 1036's March 2, 1992, letter also threatened Nosek with termination if he did not pay membership dues. In fact, Hilton also had received a letter containing such a threat. However, there is no evidence that Local 1036 approached Ralph's regarding Hilton's continued employment by it. In contrast, by letter to Lucky dated March 27, 1991, Local 1036 demanded that Lucky cease scheduling Nosek for work until he displayed proof of compliance with his membership obligations. Still, there is no allegation that Lucky ever complied with that demand.

With respect to the facts recited immediately above, the General Counsel argues, both in the brief to the Board in support of exceptions and in the remand brief, that Local 1036 threatened "to discharge a nonmember employee for nonpayment of dues to which he objects" and that "such threat violates Section 8(b)(1)(A) of the Act because it has the natural tendency to restrain and coerce nonmembers into financially supporting the union beyond what is permitted under ***Beck***." Those facts obviously establish that the General Counsel's argument is a correct one—not only with regard to Hilton, but also in regard to Nosek.

Both employees objected to being regarded as other than "financial core" members. There is no evidence that Local 1036 did not comprehend what was meant by those communi-

cations. To the contrary, it threatened Hilton's employment status if he took any "unilateral" action concerning his dues payments and played games in response to Hilton's request for current accounting statements of Local 1036's expenditures from dues. It ignored altogether Nosek's similar request. It stipulated that it never has supplied such information to any multiemployer unit employee hired since September 3, 1988.

The Board has stated that, "If the employee chooses to object, he must be apprised of the percentage of the [dues] reduction, the basis for the calculation, and the right to challenge those figures." (Footnote omitted.) *California Saw*, supra, 320 NLRB at 233. Failure to do so constitutes breach of a labor organization's duty of fair representation.

Rather than comply with that duty, Local 1036 continued to demand and collect full membership dues from Hilton and, as well, from Nosek. In the process, as set forth above, it threatened both employees with termination if they failed to continue paying full membership dues. Local 1036's willingness to pursue the latter course was demonstrated by its above-described communication to Lucky, Nosek's employer. Therefore, in the face of objection to paying more than, in effect, representation expenses, Local 1036's demand for continued payment, and its collection, of full membership dues violates Section 8(b)(1)(A) of the Act and its threats of discharge if objecting employees fail to comply with its demand constituted a violation of Section 8(b)(1)(A) of the Act.

Local 1036 resisted compliance with the General Counsel's subpoenas for information in connection with the portions of the Second Consolidated Amended Complaint, as further amended, which pertained to its alleged unlawful conduct. Eventually, after district court enforcement of a petition to compel compliance with the General Counsel's subpoena, a stipulation was achieved for sufficient information to enable the matter to proceed in connection with the charges of Hilton and

Nosek. Still, as pointed out above, a multiemployer bargaining unit is encompassed by the conclusion that Local 1036 unlawfully informed all newly hired employees from, at least, September 21, 1988 until after July 11, 1990, that they were required to become members of Local 1036 as a condition of employment.

In the totality of the foregoing circumstances, it seems proper as a remedial matter, and to implement employee rights under the Act as enunciated by the Supreme Court in *Beck* and by the Board in *California Saw*, to direct that Local 1036 reimburse not only Hilton, but also Nosek and any other employee who filed objections to full dues payment with Local 1036 on and after September 21, 1988, and who is not shown to have been furnished with the information specified above in *California Saw*, but who was obligated to continue paying full membership dues thereafter.

Of course a reimbursement remedy does not extend to any such employee who had failed to file an objection with Local 1036 to full dues payment, as did Hilton and Nosek. To be sure, since none were notified of their *Beck* rights at the threshold of their employment, there is some sympathy for an argument that they were deprived of any opportunity to object and that Respondent was at fault for such a failure. Nonetheless, the Board in *California Saw* does not appear to contemplate that reimbursement will be extended as a remedy to other than employees who are shown to have objected.

As to the notice-posting remedial requirement, Local 1036 shall be ordered to post at its hall office copies of the notice, as is normally required by the Board. However, inasmuch as employees who are, or were at one time, employed in the multiemployer bargaining unit might not visit Local 1036's hall, and as Local 1036 pleads lack of complete records of employees' identities to whom its welcoming letter had been sent, it seems appropriate to order Local 1036 to mail copies of

the notice, at its own expense, to each employee who worked in that unit since September 21, 1988, either at his/her last known address or to any other address supplied to Local 1036 by the General Counsel's office—such as, from employers' records—during the compliance phase of this proceeding.

In addition, the General Counsel requested that the Board order Local 1036 "to post a notice at all stores within the multiemployer bargaining unit[.]" That may seem a logical means for reaching employees who received a welcoming letter. However, none of those employers are respondents in this proceeding and the Board possesses no authority to require them to allow Local 1036 to post notices on their premises, at least absent some form of contractual right for such posting. Therefore, I shall order the usual remedial provision for Local 1036 to submit signed copies of the notices for posting by those employers who are willing to do so.

III. ALLEGATIONS AGAINST UNITED FOOD AND COMMERCIAL WORKERS LOCAL 951

The unfair labor practice charges against Local 951 were filed by three employees of Meijer, Inc., a Michigan corporation, with a principal office and place of business in Grand Rapids, Michigan, and with places of business throughout that State where it engages in the retail sale of groceries, household appliances, clothing and other consumer goods. In the course and conduct of those business operations during the representative period of 12 months prior to March 25, **[752]**1992, Meijer derived gross revenues in excess of $500,000 and, further, purchased goods and materials valued in excess of $5000 which were received at its Grand Rapids facilities directly from outside the State of Michigan. Therefore, at all material times, Meijer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Meijer and Local 951 have been parties to three different collective-bargaining contracts: the Newport Distribution Center Contract, the Retail Contract, and the Distribution Center Contract. The two most recent of those contracts had been effective by their terms from November 29, 1987 through September 2, 1991, and from September 2, 1991 through September 23, 1995. As a result, by virtue of Section 9(a) of the Act, Local 951 has been the exclusive representative of units of employees employed by Meijer for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Article 3.2 of each of those six collective-bargaining contracts contains a union-security clause. To the extent pertinent here, those clauses provide:[1]

> It shall be a continuing condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing and those who are not members on the execution date of this Agreement shall, following thirteen weeks of active employment, become and remain members in good standing in the Union.
>
> It shall also be a continuing condition of employment that all employees covered by this Agreement and hired on or after the date of execution shall, following thirteen (13) weeks of active employment, become and remain members in good standing in the Union.
>
> ...
>
> To be a member of the Union in good standing as required by this section, an employee must tender to the

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[1]The three 1987-1991 contracts contained the phrase "thirty (30) calendar days," which was replaced by "thirteen (13) weeks of active employment" in the 1991-1995 contracts.

> Union the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership. Any employee who is required to be a member of the Union by this section and who fails to render such uniform dues and initiation shall not be retained as an employee in the bargaining unit so long as the Union has given written notice to the Company and employee of such failure, and such failure is not cured by employee within seven (7) days of such notice.
>
> Those employees who maintain a non-member status or change their status to a non-member status and are covered by the terms of this agreement shall be required to pay as a condition of employment, an initial service fee, monthly (or otherwise) service fees to the Union for the purpose of aiding the Union in defraying cost in connection with the Union's obligations and responsibilities as the exclusive bargaining agent of the bargaining unit herein.

In light of the Supreme Court's *Beck* decision, Local 951 implemented a Service Rebate Procedure. All nonmembers would continue to be charged for an amount equivalent to full membership dues. However, under the Service Rebate Procedure, by January 15 of each year, each nonmember would be notified of his/her right to object, of the possibility that a portion of service fees paid might be rebated, and of instructions for obtaining financial disclosure materials and for filing timely objections to them.

By March 1 of each year, each responding individual would be sent a certified list of expenditures by major category for the preceding fiscal year, showing whether each category, or portion of it, is chargeable to objecting nonmembers and the certifying public accountant's explanation of method used to make those calculations. Also included is to be the percentage of each previous year's membership dues chargeable to

objecting nonmembers and a calculation of the previous year's chargeable percentage which will be applied to the amount of the current year's full members' dues. A copy of the Rebate Procedure, itself, will also be enclosed. As to individuals claiming nonmember status during a membership year, the Procedure specifies that the above-enumerated notices will be provided within 30 days of claiming nonmember status.

Objections to the annual determined service fee amount must be made in writing and received by Local 951's Grand Rapids office no later than March 31 of each year. As to individuals claiming nonmembership status at other times during a current membership year, they must file an objection within 30 days of receipt by them of the above-mentioned notices. When objections are received, an appeal procedure is conducted "and all service fees collected from the objecting nonmembers will be placed into a flat rate interest bearing escrow account pending the outcome of the appeal process." That process specified "appeal at the next regularly scheduled meeting of the Local Union's Executive Board," which will, in turn, "issue a written decision within fifteen (15) days." The objecting party then has 10 days to object to the Executive Board's decision.

If objections are received, Local 951 "will contact the American Arbitration Association within five (5) business days thereafter to arrange for an impartial arbitrator to decide the amount of the service fee." It is the American Arbitration Association (herein AAA) which selects the arbitrator and no provision is made for participation in that process by objecting nonmembers. "All timely objections will be consolidated into one hearing per year, to be held at a location and on a date determined by the arbitrator."

Rebate checks are to be issued semiannually, on or before June 1 and on or before December 1. Adjustment checks will issue, if warranted by an arbitrator's fee determination, "by the

close of the next full pay period after the date of the arbitrator's determination" from the escrow account, with interest on the amounts owed.

In his statement of "**ISSUES**" in the brief filed with the Board in support of exceptions, counsel for the General Counsel states, as one issue: "C. Whether Respondent UFCW Local 951 violated Section 8(b)(1)(A) and (2) of the Act by requiring nonmembers to file their objections with Local 951's executive board before presenting their challenges to an arbitrator." In the "**ANALYSIS AND [753]ARGUMENT**" Section of that brief, as well as in the brief filed in response to the remand, however, no independent argument is directed to the asserted issue of requiring objections to be filed with Local 951's executive board before they are presented to an arbitrator. Instead, the issue is consolidated at the end of an argument section addressed principally to an exhaustion of remedies requirement. In that section, the asserted issue of filing objections with the executive board of Local 951 is left unargued as a separate alleged violation of the Act.

It is difficult to divine, standing alone, how that aspect of Local 951's procedure could be concluded to be a violation of either Section 8(b)(1)(A) of Section 8(b)(2) of the Act. In fact, it is difficult to ascertain how it could ever be concluded to be a violation of Section 8(b)(2) of the Act. There is no evidence that Local 951 has treated the requirement of filing with its executive board as some sort of technicality or obstacle imposed to avoid receiving or addressing challenges to objectors' periodic payments under union-security provisions. Cf. *California Saw*, supra, 230 NLRB at 235-237. So far as the record discloses, Local 951 acknowledged receipt of challenges which were filed and its Executive Board processed them, albeit not to the satisfaction of employees who filed them.

Labor organizations are entitled to some latitude to when establishing a procedure for nonmembers to challenge the

amounts being required from those employees pursuant to a union-security provision. Filing with a local union's executive board is a logical step, given the fact that it is a logical body to make a final determination concerning the allocations between chargeable and nonchargeable expenditures. Seemingly, it is a body which could direct that changes be made, should there be a conclusion of merit to a challenge. Therefore, I conclude that this aspect of Local 951's challenge procedure does not give rise to a violation of either Section 8(b)(1)(A) or Section 8(b)(2) of the Act.

In his "**STATEMENT OF FACT**" in his brief to the Board, counsel for the General Counsel points out several facts which he implies, but never alleges directly, render the arbitration step as less than satisfactory, though he never actually contends that it violates Local 951's duty of fair representation. It should be pointed out that the Board appears to have accepted the propriety of a challenge procedure which specifies that arbitration under the auspices of AAA will be the ultimate step in that procedure. *California Saw*, supra, 230 NLRB at 239, 242-243. Of itself, therefore, there is no breach of the duty of fair representation by Local 951 in imposing that step as the final one in its challenge procedure.

Both the General Counsel and some Charging Parties protest the lack of discretion which the arbitration procedure affords nonmember employees who have filed challenges. For example, they have no voice in selecting AAA as the entity under whose auspices the arbitration will be conducted. And individual challenging nonmembers did not agree specifically to the arbitrators who conducted those proceedings. Yet, those are not matters alleged specifically to have violated the Act. To the extent that it might be asserted that they were litigated, and thus subject to inclusion by way of amendment to the complaint, no such motion to amend has been made. Indeed, counsel for the General Counsel makes no specific argument

addressed independently to the events of the two arbitration proceedings mentioned below. In any event, if challenge procedures in specific situations are not conducted properly, or if a particular arbitration fails to conform to what is required under the duty of fair representation, disadvantaged nonmembers may file unfair labor practices concerning them. Here, at best, it can be said only that the General Counsel questions generally arbitration under the auspices of AAA. As to that, the Board has not found a violation of the Act.

Another provision of Local 951's Service Rebate Procedure states: "Any objecting non-member must exhaust the remedies provided by this procedure prior to seeking judicial review of any issues capable of resolution under this procedure," though an arbitrator's determination may be challenged "according to law." Counsel for the General Counsel argues as to that restriction:

> Local 951 violated Section 8(b)(1)(A) and (2) of the Act by requiring objecting nonmembers to exhaust internal union remedies before challenging the Union's accounting before the NLRB and requiring objecting nonmembers to file their objections with the Union's Executive Board before appealing to an arbitrator.

As pointed out above, counsel for the General Counsel makes no argument that the last phrase in that exhaustion requirement independently violates the Act. In any event, as concluded above, there is no basis for concluding that the requirement independently violates the Act.

It is accurate that the exhaustion of remedies provision makes no specific mention of the Board. Yet, the Board need not be specified by name for a statement to reasonably imply that proceedings before it are encompassed by an exhaustion requirement. See, *Garment Workers*, 295 NLRB 411, 414-415 (1989). In that case, the Board adopted Judge Bennett's reasoning that since the word "charge" had been used in the

restriction, "seasoned, experienced, and sophisticated union officials" would understand that word to encompass "any agency involved in protecting workers rights" and "that certainly the Board would be such an agency."

Here, the quoted restriction does not use the work "charge." But, neither is it addressed to "seasoned, experienced and sophisticated union officials." At worst, it creates an ambiguity and at least some employees reasonably could interpret the phrase "judicial proceedings" as encompassing unfair labor practice proceedings under the Act. After all, such proceedings do include adversary hearings conducted by administrative law judges and, in some instances, review by United States Courts of Appeals. In fact, in *NLRB v. Shipbuilders Workers*, 391 U.S. 418 (1968), the restriction before the Court made mention neither of "Board" nor "charge." It stated only "any court or other tribunal outside of the Union." Still, the Court had no difficulty concluding that it encompassed filing charges under the Act.

Local 951 has not contended, nor presented evidence to support a contention, that it had notified any employees that the above-quoted exhaustion restriction excluded filing charges with the Board. It was Local 951 which formulated and published the restriction. As such, it bears the burden of the consequences of any ambiguity created by its wording. Accordingly, I conclude that the restriction can reasonably be read by employees as including proceedings before the Board.

[754]In *Shipbuilders Workers*, as here, the subject involved was "in the public domain and beyond the internal affairs of the union." (supra at 425.) To require, as part of a procedure to challenging amounts charged nonmembers under a union-security provision, that objectors must exhaust internal procedures is to impose an arbitrary and unreasonable requirement which is contrary to public policy. Therefore, Local 951 violated Section 8(b)(1)(A), but not Section 8(b)(2), of the Act

by publishing the above-quoted exhaustion requirement, since it constitutes a breach of the duty of fair representation. It shall be ordered to cease and desist imposing that exhaustion requirement and, affirmatively, to republish its Service Rebate Procedure with that requirement deleted.

Turning to more specific events which occurred under the Service Rebate Procedure, when Local 951 was confronted with challenges, there is evidence concerning three nonmember-employees. By the time of the hearing, Phillip G. Mulder had been employed by Meijer, in a bargaining unit represented by Local 951, continuously since March 11, 1987. Charles Buck had been employed continuously by Meijer, in a bargaining unit represented by Local 951, since May of 1988. Leon Gibbons became employed by Meijer on August 5, 1985, and, save for periods of military service, remained employed continuously by Meijer until the hearing.[2] Each became members of Local 951, apparently pursuant to the appropriate union-security provisions in then-existing collective-bargaining agreements between Local 951 and Meijer.

Each also resigned that membership: Mulder on October 27, 1988; Buck on March 30, 1989; and, Gibbons on November 13, 1989. While it acknowledged each resignation, Local 951 continued to demand that full membership dues continue to be paid by each of the three employees. The money received from them was placed in escrow, pursuant to Local 951's Service

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[2]Mulder filed the unfair labor practice charges in what has become Case 16-CB-3850-2 on November 9, 1988, and amended it on March 6, 1989, in what has become Case 16-CB-3850-3 on July 26, 1990, in what has become Case 16-CB-3850-6 on April 11, 1991, and in what has become Case 16-CB-3850-35 on July 30, 1991. The charges in what have become Cases 16-CB-3850-4 and -5 were filed by Buck and Gibbons on August 6, 1990, and on March 15, 1991, respectively. All three employees filed the charge in what has become Case 16-CB-3850-36 on August 5, 1991.

Rebate Procedure. Amounts which are attributable to what Local 951 views as nonrepresentation activities are then remitted to the nonmember-employee on June 1 and on December 1 of each year.

The General Counsel alleges that such a rebate procedure violates Section 8(b)(1)(A) and Section 8(b)(2) of the Act, because it forces nonmembers to continue paying, pursuant to a contractual union-security provision, some money allocated to activities for which Local 951 has no right to collect, because not all of its activities involve collective-bargaining, contract administration and grievance adjustment. Local 951 counters essentially that it is too burdensome to require it to make an ongoing prediction of its expenditures for activities and to constantly be adjusting amounts which can be charged for representation activities. In that regard, it points to its size, the number of different types of employers with which it maintains collective-bargaining contracts and, indeed, the geographic scope of the bargaining units in contracts with Meijer. That is simply not acceptable as a defense.

Labor organizations are obliged to refrain from utilizing union-security provisions to deprive nonmember-employees of money which will be allocated to activities other than collective bargaining, contract administration and grievance adjustment. To compel such payments through contractual union-security provisions constitutes a "forced exaction." *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 305-306 (1986). That is no less so under the Act than in the public sector.

To be sure, since objectors' payments were placed in escrow, Local 951 does not actually spend any of that money for nonrepresentation purposes. Yet, at root, the right at issue is that of not having to surrender coerced amounts designated for activities other than representation ones. When this happens, viewed from their perspective, employees are being obliged to surrender the money for such other activities, even

though it may not ultimately be spent to actually finance those activities. Even where only for temporary periods, those exactions deprive nonmembers of those funds and that is not allowable under the Act.

Local 951's situation is not salvaged by defenses of administrative difficulty and expense. In the first place, there is no actual showing that contracting employers and Local 951 would be completely incapable of adjusting deductions for nonmembers' payments under their union-security provisions. After all, for example, Meijer regularly makes deductions from employees' paychecks. In the process, it accommodates changes in those deductions.

Of course, there would be problems if Meijer, or any other employer, were obliged to make ongoing daily, weekly, or even monthly changes in amounts of nonmembers' payments to Local 951. However, in the second place, ongoing changes do not appear to be contemplated by the duty of fair representation. In *California Saw*, the Board appeared satisfied with allocations based upon the preceding year's expenses for labor organizations' activities: "On receipt of the objection, the employee's dues are reduced automatically according to past allocations of expenses for union activities grouped by categories, and an escrow arrangement is put in place." (320 NLRB 231.) The Board never concluded that either aspect of that procedure was at odds with the duty of fair representation.

The General Counsel challenges Local 951's continued compelled collection of full dues when, based upon past expenditures in various categories, it is plainly apparent that some of those payments are allocable to ongoing activities other than collective bargaining, contract administration and grievance adjustment. Local 951 has made no showing that past expenditures cannot be utilized as a guide for nonmembers' current payments, just as the respondents in *California Saw*

utilized them. In fact, as set forth above, that is exactly what it has been doing.

Such a procedure still allows for allocation changes for current years whenever a change in activities is fairly anticipated—whenever, for example, a labor organization abandons a particular non-representation activity or, by way of another example, whenever it anticipates a greater representation expenditure for such matters as an anticipated prolonged and expensive contract negotiation or for an unusually large number of grievances which will be proceeding to arbitration. If challenges are filed to those changes, Local 951, like the *California Saw* locals, can place the disputed **[755]**amounts, allocable to those projected changes, in escrow and allow to run their course the procedures for challenging those payments. For, the General Counsel does not appear to be contending that the Act is violated by the mere act of depositing truly disputed amounts in escrow accounts, pending final resolution of their disposition.

Therefore, I conclude that by continuing to collect the full amounts of membership dues from objecting nonmembers, Local 951 violated Section 8(b)(1)(A), but not Section 8(b)(2), of the Act. It shall be ordered to cease and desist from doing so and, affirmatively, to release from escrow and return to nonmembers amounts which, based upon past expenditures, are not allocable to collective bargaining, contract administration and grievance adjustment, with interest to be paid on the amounts owing.

Aside from organizing expenses, discussed in the succeeding section, counsel for the General Counsel highlights three specific aspects of the disclosures made to Mulder, Buck, and Gibbons. First, Local 951's comptroller conceded that for calendar year 1989, Local 951 had failed to disclose for what activities 6.62 percent of its total expenditures had been made. Inasmuch as the entire purpose for disclosure is to allow

nonmembers to decide whether or not to challenge amounts of dues reductions, a failure to disclose complete information, even when inadvertent, effectively deprives those employees of ability to make reasoned decisions about voicing challenges. Therefore, by failing to disclose its total expenditures for 1989, Local 951 violated Section 8(b)(1)(A) of the Act. It shall be ordered to cease and desist from failing to make full disclosure of its expenditures.

The second aspect pertains to lobbying expenses. Local 951 takes the position that such expenses, especially where shown to benefit employees in the bargaining unit in which an objector is employed, are properly chargeable as representation expenditures. Further, it argues that, in footnote 79 of *California Saw*, the Board, in effect, reserved ruling on the issue of chargeability of lobbying where, contrary to the situation in that case, a respondent contends that lobbying expenses are properly chargeable.

In the text of its *California Saw* decision, however, the Board seems to have endorsed the conclusion that lobbying is the type of activity for which expenditures would not be chargeable, in connection with its discussion of litigation expenses: "The kinds of extra-unit litigation that we contemplate as being properly chargeable to objectors under a union-security clause would not be the kind of lawsuits that are 'akin to lobbying.'" (Footnote omitted.) (supra at 238.) Consequently, it would appear that the Board has concluded that, under the Act, lobbying is not a representation activity and that expenditures for it are not chargeable to nonmembers.

Of course, consistent with its conclusion regarding litigation expenses, the Board may be willing to allow some specific lobbying expenses to be chargeable to nonmembers. However, seemingly that might occur only where it is shown that particular lobbying activities are confined to collective bargaining, contract administration and grievance adjustment and directly

benefit employees in the bargaining unit involved in a proceeding. The record and the arguments presented here have not been so finely tuned.

Local 951 has created a separate category for lobbying not related to interests of the bargaining unit. Yet, its comptroller testified that she could not be certain, from records of expenditures submitted to her, if there had been lobbying and, if so, what type of lobbying had been conducted. Beyond that, even if Local 951 had not spent any funds for lobbying during a particular year, it takes the absolute position that lobbying expenses are properly chargeable to nonmembers as a cost of representation. It has made no showing that lobbying which it has conducted had been confined to representation areas. Therefore, it is a breach of its duty of fair representation to include lobbying among the activities for collective bargaining, contract administration and grievance adjustment, in violation of Section 8(b)(1)(A) of the act.

The final aspect of Local 951's disclosures to nonmembers pertains to money submitted by it to International. Pursuant to International's constitution and to its own bylaws, Local 951 remits revenues from dues to International as per capita taxes on each member. A equivalent amount is submitted to International for each nonmember paying a service fee.[3] Contending that International is an agent of Local 951, the General Counsel argues that the latter is obliged to disclose to objectors the representation and non-representation expenditures of International. There are problems with that argument, however.

In the first place, International is not named as a respondent in this proceeding. So, it cannot be ordered to make disclosures

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[3]Local 951 also remits per capita taxes to other organizations of which it is a member—such as Michigan State AFL-CIO, Detroit Metro Local Labor Council, Jackson County Local Labor Council—but no allegation has been made concerning those payments.

to Local 951 which, in turn, the General Counsel wants Local 951 to make to nonmembers.

Second, there is no evidence that International is obliged to disclose categories of its expenditures to its chartered local unions. Accordingly, there is no evidence that Local 951 possesses power or authority to compel International to make disclosures to it.

Third, unlike the apparent situation with other organizations to which Local 951 remits per capita taxes, its remissions of such taxes and equivalent nonmember payments to International do not appear to possess any aspect of discretion. International chartered Local 951. Seemingly, Local 951 must remain affiliated with International to continue as the entity named as respondent in this proceeding. There is no basis in the record for concluding that, in seeming contrast to organizations such as the Jackson County Local Labor Council, for example, Local 951 is freely to simply terminate its relationship with International, as a course of last resort if the latter will not comply with Local 951's requests.

Fourth, as the creation and affiliate of International, Local 951 must continue paying to it the per capita tax and equivalent nonmember amounts demanded by International. There is no evidence that Local 951 has any greater discretion in that regard than does a citizen with respect to payment of state and federal taxes.

As some sort of apparent device for imposing responsibility upon Local 951 for disclosure to nonmembers of International's chargeable and nonchargeable expenditures, the General Counsel alleges that International is an agent of Local 951. Yet, the reality is that, if a general agency relationship exists, it appears to be Local 951 which is the agent of International, in light of the totality of considerations **[756]**enumerated above. Beyond that, to the extent that International is Local 951's agent with respect to per capita taxes and equivalent payments

submitted by the latter to the former, there is no evidence that Local 951 can compel International to submit the information which the General Counsel contends must be provided by Local 951 to nonmembers.

It would have been a relatively simple matter for one or more of the charging parties to have included International as a respondent in this proceeding. That could have been accomplished by filing an unfair labor practice charge against International. That did not happen, apparently. Or if it did occur, the General Counsel chose not to include such a charge among the one which have led to this consolidated proceeding. In the circumstances, therefore, it appears that simply ordering Local 951 to disclose to nonmembers information regarding International's expenditures may be to order a meaningless remedy under an agency approach.

Still, that does not mean that Mulder, Buck, and Gibbons are left without a remedy concerning the remission to International of amounts equivalent to per capita taxes. After all, it had been their service fee payments which Local 951 had compelled under union-security provisions. Local 951 has never contended that it has not received some accounting or, at least, explanation for how International expended its receipts. Obviously, whatever such information Local 951 has obtained should, in turn, be made available to nonmembers. For, it is Local 951 which "bears the burden of proving that the expenditures of the challenger's specific local union are chargeable to the degree asserted." *California Saw*, supra, 320 NLRB at 242. That burden cannot be escaped simply by handing compelled exactions over to some other entity and, then, being unwilling to divulge what that other entity has reported as to how it spends remissions made to it.

To the extent that such disclosure shows that some percentage of those expenditures by International have been for non-representation activities, objectors are entitled to a corre-

sponding reduction in the amounts which they must tender to Local 951. Beyond that, in view of its burden of proving that its expenditures have been chargeable ones, and in light of the facts that it received those payments from nonmembers and remitted a portion of them to International, it is Local 951 which must bear the burden of any failure to show that it has spent those funds for representation activities. As in other areas under the Act, any uncertainty must be resolved against Local 951. Such an approach provides a more direct method of resolving the issue of payments to International than, in the circumstances, is provided by an agency approach.

Local 951 did not supply Mulder, Buck, and Gibbons with any information concerning International's expenditures, so far as the evidence discloses. It made no effort, so far as the record shows, to do so. Therefore, it committed a breach of its duty of fair representation owned nonmembers and, thereby, violated Section 8(b)(1)(A), but not Section 8(b)(2), of the Act. It shall be ordered to cease collecting that portion of periodic dues from nonmembers, absent a disclosure of International's expenditures, and to return to Mulder, Buck and Gibbons those portions of their compelled dues which were remitted to International, with interest on amounts owing.

Turning to the final aspect of Local 951's Service Rebate Procedure, its Executive Board did meet in successive years and, both times, concluded that there was no merit to challenges to Local 951's allocations and amounts of expenditures. That same conclusion was reached in the subsequent successive arbitrations conducted under the auspices of AAA. As a consequence, Mulder Buck and Gibbons were obliged to accept results which included a failure to exclude lobbying expenses as a chargeable representation activity and, further, did not account for International's expenditures of equivalent amounts remitted to it by Local 951.

The 1990 arbitration did not end there. On July 24, 1991, Local 951 filed an Application for Order Confirming an Arbitration Award with the United States District Court for the Western District of Michigan. That action was filed against Mulder, Buck and Gibbons. It sought confirmation of the arbitration award issued on July 27, 1990. Based upon the underlying failure to disclose allocation of International's expenditures and, as well, the inclusion of lobbying expenses as a chargeable item, the General Counsel alleges that Local 951 violated Sections 8(b)(1)(A) and (2) of the Act by filing and pursuing the Application for Order Confirming an Arbitration Award. I agree as to the alleged violation of Section 8(b)(1)(A) of the Act, though I find no basis for concluding that there has been a violation of Section 8(b)(2) of the Act in support of which no argument has been advanced.

The 1990 arbitration award was inherently defective because it effectively endorsed a failure to disclose information needed by objectors, the International's expenditure allocation, and endorsed allowing lobbying expenses to be included as chargeable. As concluded above, both violated Section 8(b)(1)(A) of the Act. Consequently, the arbitration award was based upon and endorsed unfair labor practices.

As it turned out, the District Court action was dismissed and the dismissal was upheld on appeal. See, *Commercial Workers Local 951, Mulder,* 31 F.3d 365 (6th Cir. 1994). Consequently, there is no bar to considering under the Act the lawfulness of Local 951's action to confirm arbitration as a result of the holdings in *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731 (1983).

There can be no question that Local 951 knew that lobbying expenses had been included as being made for a representation activity. There can be no question that it also knew that International's allocation of expenditures had been excluded from its disclosures to objecting employees. In consequence, at

the time that it filed its district court action, it possessed knowledge of the facts underlying unfair labor practices. The district court action had been commenced and maintained to confirm an arbitration award which, in turn, had endorsed unfair labor practices. In these circumstances, by filing a judicial action to confirm an arbitration award which endorsed unfair labor practices, Local 951 violated Section 8(b)(1)(A), but not Section 8(b)(2), of the Act.

IV. ALLOCATION OF ORGANIZING EXPENSES

Two local-union-respondents contend that organizing is an activity which should be included within the ambit of collective bargaining, contract administration and grievance adjustment. They are Local 951 and United Food and Commercial Workers Local 7. The appropriate parties stipulated, at all material times, Local 7 has been the exclusive representative, within the meaning of Section 9(a) of the Act, of employees working in separate units of employees working in Glenwood Springs, Fruita and Steamboat Springs, Colo-[757]rado, for City Markets. The most recent collective-bargaining contracts between Local 7 and City Markets were effective by their terms from September 13, 1987 through August 4, 1990, and from August 5, 1990 through July 31, 1993. Only employees working at Steamboat Springs had been subject to a union-security provision in the 1990 to 1993 contract.

The appropriate parties further stipulated that Local 7 is the exclusive representative of a unit of employees working for Champion Boxed Beef, as a result of a series of collective-bargaining contracts between those parties. The two most recent contracts were effective by their terms from May 1, 1988 through May 4, 1991, and from May 5, 1991 through May 5, 1994. Both contained union-security provisions.

For the most part, the unfair labor practices against Local 7 have been settled. Reserved from those settlements is the issue of allocation of expenses for organizing. The General Counsel and certain Charging Parties contend—contrary to Local 7 and, as well, to Local 951—that expenditures for such activity are not ones for collective bargaining, contract administration and grievance adjustment. I do not agree.

The principal reason for the argument that organizing expenses are not allocable to representation activities is that they are not chargeable to nonmembers under the Railway Labor Act and in the public sector. It is further argued that such expenditures do not directly benefit employees in units represented by Local 7 and Local 951 or, at least, have not been shown specifically to confer any benefit on employees in those units. To the contrary, it is contended, such expenditures are ideological in nature and, like lobbying, should not be allocated to collective bargaining, contract administration and grievance adjustment activities.

In *California Saw*, the Board reached conclusions which are pertinent to, though not dispositive of, that issue. First, it concluded that Railway Labor Act and public sector precedent does not govern evaluation under the Act of union expenditures and of allocation concerning them. Second, it concluded that unit-by-unit accounting and restriction of expenditures is not requiring under the Act. Third, the Board concluded that costs of some extra-unit activities are properly chargeable to nonmembers if those activities are "germane to the union's role in collective bargaining, contract administration, and grievance adjustment—regardless of whether the activities were performed for the direct benefit of the objector's bargaining unit." (supra at 239.)

As to the first of those three conclusions, it is necessary to turn to Section 1 of the Act. It states, in pertinent part, that "inequality of bargaining power between employees" and

employers "substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." In other words, conditions which led Congress to conclude that passage of the Act was warranted included, specifically, concern with the adverse affect upon commerce of wages and working conditions not only within a given industry but, also, in industry generally. Given those "FINDINGS" by Congress, it is difficult to conclude that, under the Act, employees of a particular employers, or of employers in a particular industry, can be viewed in isolation. To the contrary, to promote the flow of commerce, Congress believed it necessary to consider the entire employment picture—as opposed to confining or isolating consideration of it to individual segments.

Section 1 of the Act continues by declaring, inter alia, that it is "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining." That policy, of necessity, is a general one and at no point did Congress limit the scope of its reach. To promote the free flow of commerce, and to avoid or minimize business depressions, it is necessary eliminate uncompetitive "wage rates and working conditions within and between industries" and one vehicle for so doing is "encouraging the practice and procedure of collective bargaining[.]"

Viewed from the perspective of Congress' concern with the free flow of commerce and with its approach to eliminating obstructions to it, under the Act organizing—even when directed to employees in firms within an industry other than the one where specific employees work and, moreover, even when

directed to firms in industries other than the one in which particular employees may work—is an activity consistent with representation and, beyond that, is a necessary incident of one means enunciated by Congress to promote the free flow of commerce.

The Board's conclusion concerning unit-by-unit evaluation of expenditures by labor organizations is consistent with Section 1 of the Act. So, too, is its conclusion that extra-unit expenses can be properly charged to nonmembers, so long as such expenditures have been made for representation purposes. In sum, viewing this issue from the perspective of the Act, itself, and of the Board's application of it, organizing activities are properly allocable to collective bargaining, contract administration and grievance adjustment under the Act.

During the hearing, different experts testified in support of the opposing positions on this issue. It may well be that in different industries and in different geographic areas the extent of organization of the work force may or may not, in reality, support or refute the abstract proposition that wages, benefits and employment conditions of employees working for one employer are affected by those which prevail in the industry or area. Obviously, Congress thought that they did. Still, this is not exclusively an issue of reality.

It is a common opinion—one which rises almost to the level of mantra in many quarters—that competitiveness of a unionized employer is affected adversely whenever that employer's competitors are not also unionized. That opinion is based upon the common sense view that those competitors possess latitude to reduce prices which a unionized employer does not possess. Rarely is that opinion supported by objective analysis conducted or studied by employers who espouse it. Nevertheless, it is an opinion held firmly and has led to two consequences.

First, it is the basis for objections by a unionized employer whenever its employees' bargaining agent makes demands for

increased wages and benefits and, in many instances, for improved working conditions. In other words, it becomes a means for employer resistance to correcting the sometimes depressed "wage rates and the purchasing power of wage [758]earners" which Congress sought, in part, to correct through allowing employees to organize and become represented. If organizing is not encompassed as a representation activity under the Act, then such a conclusion undermines the Congress' stated means for correcting ills which it concluded had ultimately been undermining the free flow of commerce.

Second, it is not uncommon for particular employers to retaliate against their employees in an effort to defeat the efforts of those employees to become represented, or to retain representation already achieved, so that those employers will not be faced with a situation where they are left with restricted latitude to lower prices to meet those of nonunionized competitors. Obviously, such conduct violates the Act. Still, it occurs. When it does, it creates industrial strife, disrupts the earnings of employees who become targets of unlawful actions, and necessitates expenditure of public resources to remedy such situations. As a result, situations outside the immediate employment relationship of employees can affect their own representation and, not infrequently, their continued employment.

In view of the foregoing considerations, I conclude that organizing activities are a necessary incident of collective bargaining and of contract administration. Such activities are representational and the duty of fair representation is not breached whenever labor organizations charge nonmembers for the expenses of organizing activities. I conclude that, by allocating organizing expenditures as chargeable to nonmembers, Local 7 and Local 951 did not violate the Act.

CONCLUSIONS OF LAW

United Food and Commercial Workers Local 951 is a labor organization which has committed unfair labor practices affecting commerce, in violation of Section 8(b)(1)(A) of the Act, by continuing to charge and collect full membership dues from employees who have objected to continuing to pay dues and fees in amounts allocated to activities other than collective bargaining, contract administration and grievance adjustment; by failing to disclose to objecting nonmembers all expenditures which it has made; by failing to disclose to objecting nonmembers allocations between representation and nonrepresentation expenditures have been made by United Food and Commercial Workers International Union, AFL-CIO, CLC, in light of remissions to it by Local 951 of amounts for nonmembers which are equivalent to per capita taxes remitted for members; by collecting fees and retaining previously collected fees from objecting nonmembers which are allocable to lobbying expenses; by requiring objecting nonmembers to exhaust remedies provided by Local 951's Service Rebate Procedure for challenging dues reduction "prior to seeking judicial review of any issue capable of resolution under [that] procedure"; and, by filing an Application for Order Confirming an Arbitration Award against nonmembers with the United States District Court for the Western District of Michigan to confirm an arbitration award which endorsed Local 951's breaches of its duty of fair representation.

United Food and Commercial Workers Local 1036 is a labor organization which has committed unfair labor practices affecting commerce, in violation of Section 8(b)(1)(A) of the Act, by informing employees that, as a condition of continued employment, those employees must become members of Local 1036, without also informing employees that they have the right to not submit membership applications and to not perform any

obligations of union membership other than the tender of periodic dues and initiation uniformly required as a condition of acquiring or retaining membership in Local 1036 and, further, without informing employees of their *Beck* rights; by continuing to demand that objecting nonmembers continue to pay full membership dues and by continuing to collect and retain those payments; by failing to provide objecting nonmembers with information concerning the amounts of dues reductions, the basis for those calculations and a right to challenge those figures; and, by threatening have discharged employees who fail to continue submitting full membership dues, even though those nonmembers have objected to doing so. However, Local 1036 has not violated the Act in any other manner alleged in the second consolidated amended complaint, as further amended.

United Food and Commercial Workers Local 7 has not violated the Act by collecting from objecting nonmembers and retaining amounts which are allocated to expenses of organizing activities.

THE REMEDY

Having concluded that United Food and Commercial Workers Local 951 and United Food and Commercial Workers Local 1036 engaged in unfair labor practices, I shall order that each of them be ordered to cease and desist therefrom and, further, that each of them be ordered to take certain affirmative action to effectuate the policies of the Act.

With respect to the latter, United Food and Commercial Workers Local 951 shall be ordered to refund with interest to Phillip G. Mulder, Charles Buck, Leon Gibbons, and all other objecting nonmembers, *California Saw*, supra, 320 NLRB at 254, all fees collected from them and still retained which are not shown by Local 951 to be allocable to representation

activities. Amounts refunded shall include all fees allocated to lobbying and, as well, amounts remitted on behalf of those objecting nonmembers to United Food and Commercial Workers International Union, AFL-CIO, CLC, except to the extent that Local 951 shows that those remissions were allocable for representation activities by International. Local 951 shall be further ordered to reimburse with interest Mulder, Buck, and Gibbons for any expenses personally incurred by any of them for defending the application to confirm arbitration award filed against them on July 24, 1991, in the United States District Court for the Western District of Michigan. Finally, it shall be ordered to remove from its Service Rebate Procedure the requirement that "Any objecting non-member must exhaust the remedies provided by this procedure prior to seeking judicial review of any issues capable of resolution under this procedure," and, further, to distribute to all objecting nonmembers copies of the Service Rebate Procedure with that portion deleted.

Because it failed altogether to notify employees of their right to remain nonmembers and of their *Beck* rights, United Food and Commercial Workers Local 1036 shall be affirmatively ordered to notify Glenn T. Hilton, John B. Nosek, and all other employees who are employed since September 21, 1988, in the multiemployer bargaining unit covered by Local 1036's collective-bargaining contracts with Food Employers Council, Inc. of the right of each of those employees to not file membership applications and to not perform any obligation of union membership other than the tender of periodic **[759]**dues and initiation fees uniformly required as a condition of acquiring or retaining membership in Local 1036 and, further, of the *Beck* rights of those employees. Furthermore, it shall be ordered to refund with interest to Hilton, Nosek and other objecting nonmembers that portion of dues or fees which were collected from them on and after September 18, 1988, following the

objection of each, and which were allocated to activities of Local 1036 other than collective bargaining, contract administration and grievance adjustment. Finally, in addition to the usual notice posting requirements, Local 1036 shall be ordered to mail at its own expense copies of the notice to all employees employed in the multiemployer bargaining unit by members of Food Employers Council, Inc. and, as well, to any other employees who received "welcoming" letters, since September 21, 1988, to the last known address of each employee or, if the General Counsel's office directs, to addresses supplied to Local 1036 by the General Counsel during the compliance phase of this proceeding.

[Recommended Order is omitted from publication.]

APPENDIX H

UNITED STATES CONSTITUTION, FIRST, FIFTH AND FOURTEENTH AMENDMENTS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

RELEVANT STATUTORY PROVISIONS

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §§ 157, 158(a)(3), and 158(b)(1)(A), 159(e) and 164(b).

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following

an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

§ 159. Representatives and elections

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

§ 164. Construction of provisions

(b) Agreements requiring union membership in violation of State law

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

RAILWAY LABOR ACT, 45 U.S.C. §§ 152, Fourth and Eleventh

§ 152. General Duties

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any

such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

§ 152, Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted —

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and

penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee

from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

(3)

Supreme Court, U.S.
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No. 01-1867

IN THE

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PHILLIP MULDER, *et al.*,
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v.

NATIONAL LABOR RELATIONS BOARD, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR LOCALS 7 & 951, UNITED FOOD & COMMERCIAL WORKERS IN OPPOSITION TO THE PETITION FOR CERTIORARI

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STATEMENT

Under the National Labor Relations Act, as interpreted in *Communications Workers v. Beck*, 487 U.S. 735 (1988), a union may require bargaining unit employees covered by a union security clause who are objecting nonmembers to bear their share of the costs of union activities that are "germane to the union's role in collective bargaining" but not of the costs of "nongermane" union activities. *California Saw & Knife Works*, 320 NLRB 224, 239 (1995), *enf'd sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir.), *cert. denied sub nom. Strang v. NLRB*, 525 U.S. 813 (1998).

In the instant case, the National Labor Relations Board concluded "that, at least with respect to organizing within the same competitive market as the bargaining unit employer, organizing expenses are chargeable to bargaining unit employees under the *California Saw* standard." Pet. App. 52a-53a (footnote omitted).

On a petition for review, the *en banc* Ninth Circuit unanimously sustained the Board's conclusion that "for NLRA industries, organizing within the competitive market is germane to collective bargaining." Pet. App. 13a.

ARGUMENT

The instant case is the first—and to date the only—case in which the National Labor Relations Board has addressed the extent to which NLRA union organizing activities are "germane to the union's role in [the NLRA] collective bargaining [system]" and thus chargeable to objecting nonmembers under this Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988). The NLRB's limited and nuanced ruling—that "[union] organizing within the same competitive market as the [union organized] bargaining unit employer" is "germane to the union's role in [the NLRA] collective bargaining [system]" and thus is "chargeable to bargaining unit employees"—is an entirely sound construction of the NLRA by the agency charged with administering the Act. And, by definition, the Ninth Circuit decision affirming that NLRB ruling is *not* a decision that generates any conflict among the circuits. Equally to the point here—and contrary to the petitioners' central argument for a grant of *certiorari*—nothing in this Court's *Beck* decision or in the decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), speaks directly to the issue decided by the Board, and nothing in the *Beck* and *Ellis* decisions or in the reasoning of those decisions is in any way inconsistent with

the Board's decision. For all these reasons, this is not a case that calls for this Court's review, and the petition for *certiorari* should therefore be denied.

1. In explaining its ruling, the Board began from the proposition that the language and policies of the Act reflect "Congress' understanding that organization of multiple groups of employees, not just a single bargaining unit or the employees of a single employer in an industry, was necessary to achieve its goal of stabilizing wage rates and preventing depression of employees' wage rates and purchasing power." Pet. App. 53a & 54a.[1] And, the Board summarized "the evidence . . . demonstrat[ing] that, under the National Labor Relations Act, organizing is both germane to a union's role as a collective-bargaining representative and can benefit all employees in a unit already represented by a union" as follows:

> "Unions are able to negotiate higher wages for the employees they represent when the employees of employers in the same competitive market are organized, and unions are less able to do so when they are not organized. Thus, represented employees, whether or not they are members of the union that represents them, benefit, through the results of collective bargaining, from that union's organization of other employees." Pet. App. 59a.

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[1] *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504 n. 24 (1940), where this Court observed that the NLRA is "aimed at protecting and favoring labor organizations and eliminating the competition of employers and employees based on labor conditions regarded as substandard, through the establishment of industry-wide standards . . . by collective bargaining." As its preamble states, the Act's purpose is to achieve "the stabilization of competitive wage rates and working conditions within and between industries" by "encourag[ing] the practice and procedure of collective bargaining." 29 U.S.C. § 151.

Judge Posner—in addressing the correctness of the NLRB's general *California Saw* "germane to collective bargaining" standard—elucidated the logic of the Board's point in this case by explaining "the economic interdependence of bargaining units" where "different employers were competing." *Machinists v. NLRB*, *supra*, 133 F.3d at 1016. In these circumstances, Judge Posner observed, "[t]he union's ability to extract higher wages from the first employer will be constrained by the competition of the second employer, who may be paying lower wages and thus incurring lower operating costs." *Id.* For just that reason, it is "in the interest of the [employees] in the first firm, . . . that the union succeed in negotiating an advantageous collective bargaining agreement for the competing firm's [employees]." *Id.* And, of course, as the Board recognized in its decision here, the union cannot negotiate such an agreement at the competing firm, if it does not represent that firm's employees.

In enforcing the NLRB's *California Saw* decision, the Seventh Circuit observed that "[i]t is hard to think of a task more suitable for an administrative agency that specializes in labor relations, . . . than crafting the rules for translating the generalities of *Beck* . . . into a workable system for determining and collecting agency fees." *Machinists*, 133 F.3d at 1015. *Accord Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir. 2000). That being so, "[a]ll the details necessary to make the rule of *Beck* operational were left to the Board." *Machinists*, 133 F.3d at 1015. *See, e.g., Marquez v. Screen Actors Guild*, 525 U.S. 33, 43 (1998)("[t]he Board is currently in the process of . . . giv[ing] guidance to unions about what they must do . . . under *Beck*"). The careful, step-by-step approach to defining what is germane to the NLRA collective bargaining system, represented by the Board's decision here, is an exemplar of responsible interstitial administrative law making. *See* Pet. App. 53a n. 20 (emphasizing the narrow scope of the holding in this case).

2. Against the foregoing, the petitioners argue that this Court's *Beck* and *Ellis* decisions preclude the NLRB's decision here and, indeed, preclude the Board from making *any* independent inquiry into whether NLRA union organizing is in whole or in any part germane to the NLRA collective bargaining system. *See* Pet. 19 ("any coherent reading of *Ellis* and *Beck* shows that this Court has already determined the clear meaning of RLA § 2, Eleventh and NLRA § 8(a)(3) on the issue presented").

In support of their argument, the petitioners maintain that *Beck* stands for the proposition that each and every aspect of the Railway Labor Act "germane to collective bargaining" law carries over as a governing rule of NLRA law. Pet. 9. Thus read, the petitioners argue, *Beck* requires that each of the determinations made in *Ellis* as to which particular union activities are, or are not, germane to the RLA collective bargaining system—especially the determination that, as a general matter, organizing activity is not germane to the RLA system—is, *pro tanto*, an NLRA germaneness determination as well. Pet. 9.

The fatal flaw in the petitioners' effort to generate a conflict between the NLRB decision below and this Court's decisions is that *Beck* does *not* state any NLRA/RLA identity rule of the sort posited by the petitioners. And, far from supporting the petitioners' position, this Court's *Ellis* opinion confirms that the task of determining whether or not a union activity is germane to collective bargaining is sensitive to the statutory context, requiring close attention to the particular statutory collective bargaining system at issue.

(a) The sole question presented in *Beck* was whether NLRA § 8(a)(3)—in contrast to RLA § 2, Eleventh as interpreted in *Machinists v. Street*, 367 U.S. 740 (1961)—"permits a union, over the objections of dues-paying nonmember employees to expend funds so collected

[pursuant to a union security agreement] on activities unrelated to collective bargaining, contract administration, or grievance adjustment." 487 U.S. at 738.

Beck did *not* present, and the *Beck* Court did *not* decide, any question as to which particular union activities are related to collective bargaining and which are not. What the *Beck* Court did do was to treat the construction of RLA § 2, Eleventh in *Machinists v. Street* as "controlling" with respect to the NLRA question at hand. 487 U.S. at 745.

It was precisely to explain this reliance on *Street* that the *Beck* Court stated that "§ 8(a)(3) and § 2, Eleventh are in all material respects identical." 487 U.S. at 745. In context, then, what the Court meant by that statement—on which the petitioners here base their case—was that the two statutes are identical in all respects "material" to the question before the *Beck* Court, *viz.* whether the statute permits unions to require bargaining unit employees covered by a union security agreement—including objecting nonmembers—to finance the *full* range of union activities (including those that are unrelated to collective bargaining). The *Beck* Court did not say that the two statutes are identical in all respects material to the next-level question that arises if the answer to that threshold question is "no"—*viz.*, which particular union activities are related to collective bargaining and hence chargeable to all employees, and which are not related to collective bargaining and hence not chargeable. Indeed, the *Beck* Court, while recognizing the identity between the two statutes just noted, also recognizes that "the NLRA and RLA differ in certain crucial respects." *Id.* at 745.[2]

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[2] The petitioners' half-hearted attempt to generate a circuit conflict out of the lower court opinion in *Beck*, Pet. 21, fails for the simple reason that the chargeability of organizing was *not* an issue raised by on appeal to the Fourth Circuit.

The Fourth Circuit opinion in *Beck* explains that "[the CWA] defendants, in their brief in this court, limit themselves to two claims of

(b) In *Ellis v. Railway Clerks*, *supra*, the Court essayed the task of classifying a number of RLA union activities as

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error." *Beck v. Communications Workers*, 776 F.2d 1187, 1194 (4th Cir. 1985). The first claim of error went to the issue that was later decided by this Court in *Beck*, i.e., whether nonmembers had a right under the NLRA to object to payment of the non-germane portion of the agency fee. The CWA's "other claim of error relate[d] to the standard of proof to be used in resolving plaintiffs claim for a refund." *Id.* at 1195. The standard of proof issue was important, because the district court had disallowed the chargeability to objectors of 81% of CWA's expenditures, for the most part on the ground that the union had failed to prove by "clear and convincing evidence" that those expenditures were germane to collective bargaining. *Id.* at 1192-93.

The Fourth Circuit agreed that the district court had employed the wrong standard of proof. 776 F.2d at 1210. The court of appeals then stated, "Our problem, therefore, is to ascertain the findings or conclusions of the special master as confirmed by the district judge which may have been affected or influenced by the application of the incorrect standard of proof." *Id.* In this regard, the court of appeals noted that the lower court "found no occasion in dealing with four of the[CWA expenditure] classifications to inquire into the accuracy of the charges or the propriety of the classification[,] . . . because he found these groups to include charges impermissible against plaintiffs as a matter of law." *Id.*

This was pertinent because, on appeal, CWA had *not* challenged the legal rulings that led the trial court to disallow these four categories, including the ruling that organizing (one of the four categories) was not chargeable as a matter of law. That being so, the court of appeals concluded that "[t]he error in standard of proof had no connection with the findings and conclusions on the chargeability of expenditures in these four categories and cannot provide a justification for a reversal." 776 F.2d at 1211.

The appellate court then went on to consider "[t]he other expenditures listed under the broad classifications of 'collective bargaining,' 'grievance,' and 'contract administration,'" and concluded that, because "it seemed that expenditures under these headings were reviewed on their facts," the special master's conclusions might have been infected by the standard of proof error and had to be reversed. 776 F.2d at 1212.

In sum, the chargeability of NLRA union organizing was *not* an issue presented to—or decided by—the Fourth Circuit in the *Beck* case.

chargeable or nonchargeable to objecting employees by applying a "germane to collective bargaining" standard. In so doing, the *Ellis* Court paid close attention to the particulars of the RLA legislative scheme and the nature of the RLA collective bargaining system.[3]

Ellis thus makes it plain that the germaneness test does not call for a wholly abstract inquiry but rather for a concrete inquiry into the particular collective bargaining system as to which the "germaneness" of the activity in question is being determined and the statutory scheme governing that system. And, contrary to the petitioners' argument, it follows ineluctably that a determination that a particular union activity is or is not germane to collective bargaining that turns on the peculiarities of one statutory collective bargaining system—such as the *Ellis* determination on RLA union

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[3] To illustrate the point that *Ellis* proceeds by giving careful consideration to the RLA collective bargaining system and the RLA statutory scheme, we note the following: The *Ellis* Court found RLA union convention costs are chargeable on the ground that "Conventions such as those at issue here are normal events about which Congress was thoroughly informed." 466 U.S. at 448-449. *See id.* 449 n. 10 (citing hearing testimony). And, the *Ellis* Court found that RLA union social activities are chargeable on the basis of "a revealing statement [by] Senator Thomas, Chairman of the Senate Subcommittee" to the effect that "he did not want the bill to say that 'the unions . . . must not have any of the . . . kinds of little dues that they take up for giving a party, or something of that nature,' Senate Hearings, at 173-174," and the absence of any "indication that other Members of Congress were any more inclined to scrutinize the minor incidental expenses incurred by the union." *Id.* 450. In addition, the *Ellis* Court held that the portion of RLA union publications covering chargeable activities are chargeable on the grounds that "Congress can be assumed to have known that union funds go toward union publications," because "it is an accepted and basic union activity," and "[t]he costs of 'worker education' were specifically mentioned during the hearings. House Hearings, at 275; Senate Hearings, at 236." *Id.* 451.

organizing—is not transferable to other significantly different statutory collective bargaining systems.[4]

The *Ellis* Court made its most painstaking analysis of the RLA collective bargaining system and the RLA legislative scheme in determining the chargeability of RLA union organizing activity. And, in the end, the *Ellis* ruling that RLA union organizing expenditures are not chargeable rests on considerations peculiar to the RLA that proved determinative in the enactment of the 1950 RLA amendment authorizing union security agreements, considerations having nothing to do with the NLRA.

At all times pertinent to the framing of the RLA, the railroads operated essentially as regulated regional monopolies and not as direct competitors whose market positions are affected by relative labor costs. *See Union Pacific RR Co. v. United States*, 313 U.S. 450, 461 (1941). Given this context, the RLA was "infused with the purpose of

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[4] *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991)—a public sector case—provides further confirmation that whether an activity is "germane to collective bargaining" turns on the nature of the particular collective bargaining system established by the legislature in the particular statute in question.

In deciding "[t]he chargeability of expenses incident to preparation for a strike which . . . would have been illegal under Michigan law," the *Lehnert* Court first noted that "[h]ad the [union] actually engaged in an illegal strike, the union clearly could not have charged the expenses incident to that strike to [objectors]," because "no legitimate governmental interest . . . would be served by compelling objecting employees to subsidize activity that the State has chosen to disallow." 500 U.S. at 530 & 531. But, the Court went on to hold that "using dissenters' funds to threaten or prepare for such conduct" was entirely proper, as "[t]he Michigan Legislature . . . ha[d] chosen not to impose such a restriction" and the evidence indicated "that outward preparations for a potential strike serve as an effective bargaining tool." *Id.* Obviously, neither of these points apply in determining whether strike activities are "germane to collective bargaining" under the NLRA or the RLA.

securing self-adjustment between the effectively organized railroads and the equally effective railroad unions." *Street*, 367 U.S. at 760. And, when Congress took up the union security amendments to the RLA in 1950, it was informed that upwards of 85% of the railroad industry had been organized. *Id.* 754 & 762.

In light of the highly developed state of collective bargaining under the RLA, the principal justification advanced for legalizing RLA union security agreements was that "collective bargaining [in] the railroad industry is more costly from a monetary standpoint than that carried on in any other industry," because "[t]he administrative machinery is more complete and more complex." *Street*, 367 U.S. at 761.

At the same time, as the *Ellis* Court emphasized, George Harrison, the President of the Brotherhood of Railway Clerks and the principal union spokesman at the 1950 RLA hearings, "expressly disclaimed that the union shop was sought in order to strengthen the bargaining power of unions." 466 U.S. at 451. The Court added that, "[w]hen asked if the union shop would 'strengthen your industry-wide bargaining as [it] presently exists in the railroad industry,'" Mr. Harrison "replied: 'I do not think it would affect the power of bargaining one way or the other.'" *Id.* 451 n. 12.

Given that "presently exist[ing]" fully-organized RLA system of "industry-wide bargaining," the *Ellis* Court concluded that organizing under the RLA "can afford only the most attenuated benefits to collective bargaining." 466 U.S. at 451 n. 12 & 452. Indeed, in this context, the only argument for treating organizing as chargeable was that it enhanced "overall union power" and "what is good for the union is good for the employees." *Id.* at 451 & 452. Against that background and particularly in light of the express disclaimer by the railroad unions' spokesman that those unions were seeking to strengthen their bargaining position, the *Ellis* Court concluded that "organizational efforts were

not what Congress aimed to enhance by authorizing the union shop" in amending the RLA. *Id.* 452.

It is perverse for the petitioners to ascribe to the *Ellis* Court an intent that the Court's detailed scrutiny of the RLA legislative history—which delved into the minutiae of the 1950 hearings on amending the RLA—would control the NLRB's determination of whether NLRA union organizing is "germane" to the very different NLRA system of collective bargaining crafted by the 1935 and 1947 Congresses. To the contrary, what *Ellis* teaches is that the NLRB must engage in a similarly painstaking consideration of the nature of the NLRA collective bargaining system and the NLRA legislative scheme in making the NLRA union organizing germaneness determination. As we have explained, the Board has done just that and has reached a decision that reflects the differences between the NLRA and the RLA with respect to the role assigned to union organizing in each system, which, as this Court has explained, are "responsive to the difference between the 'embryo organizations in the industries covered by' the NLRA, and the already 'strongly organized' railway unions." *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385 n. 20 (1969), quoting 1 NLRB, *Legislative History of the National Labor Relations Act, 1935* at 1329 (1949).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 01-1867

In the Supreme Court of the United States

PHILLIP MULDER, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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30 pgs

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that organizing employees of employers in the competitive market is germane to a union's role as a collective bargaining representative under the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-24a) is reported at 284 F.3d 1099. The prior opinion of the court of appeals panel (Pet. App. 31a-39a) is reported at 249 F.3d 1115. The decision and order of the National Labor Relations Board (Pet. App. 40a-94a) and the supplemental decision of the administrative law judge (Pet. App. 95a-136a) are reported at 329 N.L.R.B. 730.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2002. The petition for a writ of certiorari was filed on June 21, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) makes it an unfair labor practice for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. 158(b)(1)(A). Section 7 of the NLRA affords employees the right to engage, or "to refrain from" engaging, in activities in support of collective bargaining. 29 U.S.C. 157. Under Section 8(a)(3) of the NLRA, however, an employer and a union may enter into an agreement requiring, as a condition of employment, that bargaining-unit employees maintain "membership" in the union, provided that membership is available to all and that it requires only "tender[ing] the periodic dues and the initiation fees uniformly required." 29 U.S.C. 158(a)(3); see *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963) ("'Membership' as a condition of employment is whittled down to its financial core."). The NLRA also permits an "agency shop" agreement, under which employees are not required to maintain "membership" in the union but are required, as a condition of continued employment, to pay to the union sums equal to the initiation fees and periodic dues paid by union members. *General Motors*, 373 U.S. at 743-744.

As construed in this Court's decisions, Section 8(a)(3) of the NLRA does not permit a union, over the objection of dues-paying nonmember employees, to expend funds so collected on union activities "beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 745 (1988). The Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, contains a union-security provision which this Court has

characterized as a "statutory equivalent" of NLRA Section 8(a)(3). See 45 U.S.C. 152 Eleventh (a); *Beck*, 487 U.S. at 762. This Court has concluded that the RLA does not permit a union to spend funds collected from objecting nonmembers on "general organizing efforts." *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435, 440 (1984).

The issue in this case is whether, consistent with *Beck* and *Ellis*, the National Labor Relations Board may craft a narrower rule that permits objecting nonmembers in industries covered by the NLRA to be charged for organizing efforts directed at employers in the same competitive market as their own employer.

2. Petitioners are objecting nonmember employees in bargaining units represented by locals of the United Food and Commercial Workers Union (UFCW) and are employed in the retail food (grocery) industry in the States of Michigan, Colorado, and California. Pet. App. 6a & n.7, 41a-42a, 43a-44a. In 1988 and 1989, petitioners resigned from membership in their respective UFCW locals and objected to the use of their dues in support of "nonrepresentational activities." *Id.* at 42a, 44a. On November 13, 1991, acting on charges filed by petitioners, the Board's General Counsel issued a second consolidated amended complaint alleging, in relevant part, that UFCW Locals 7 and 951 violated Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), by expending on organizing activities dues and fees collected from objecting nonmembers. Pet. App. 6a, 41a.

Initially, after a hearing, an administrative law judge (ALJ) dismissed that allegation without reaching the merits. See Pet. 5 n.1. The Board, however, remanded the proceeding to the ALJ for further consideration in light of *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), enf'd *sub nom. Int'l Ass'n of Machinists* v.

NLRB, 133 F.3d 1012 (7th Cir.), cert. denied, 525 U.S. 813 (1998), a decision that post-dated the ALJ's dismissal order in the instant case. Pet. App. 95a.[1] On January 31, 1997, the ALJ issued a supplemental decision. *Id.* at 95a-136a. Applying *California Saw*, the ALJ found that organizing activities directed at employers who compete with an already-unionized employer "are a necessary incident of collective bargaining." *Id.* at 132a. The ALJ therefore dismissed the complaint in relevant part as to UFCW Locals 7 and 951. *Id.* at 134a.

3. On September 30, 1999, the Board issued a decision affirming the ALJ in pertinent part. Pet. App. 40a-94a. Addressing the question for the first time, the Board held that, "with respect to organizing within the same competitive market as the bargaining unit employer, organizing expenses are chargeable to bargaining unit employees under the *California Saw* standard." *Id.* at 53a. The Board therefore concluded that Locals 7 and 951 did not violate their duty of fair representation under Section 8(b)(1)(A) by charging objecting nonmembers for organizing expenses incurred in the same competitive market. *Id.* at 53a & n.20, 59a.

In reaching that conclusion, the Board relied on "abundant evidence" developed in the administrative

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[1] In *California Saw*, the Board, applying this Court's decision in *Beck*, concluded that an expenditure incurred by a union outside of an objecting nonmember's bargaining unit is chargeable to the objector if the expenditure (1) is germane to the union's role in collective bargaining, contract administration, or grievance adjustment, and (2) is incurred for "services that may ultimately inure to the benefit of the members of the local union." *California Saw*, 320 N.L.R.B. at 239 (quoting *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991)); see also Pet. App. 52a.

record that "in collective bargaining, unions are able to obtain higher wages for the employees they represent, whether union members or not, when the employees of employers in the same competitive market are unionized." Pet. App. 54a. The Board explained that the expert testimony in this case established general agreement among economists that "represented employees' wage rates increase or decline as the percentage of employees who are unionized increases or declines." *Ibid.*

The Board in addition relied on "persuasive" record evidence demonstrating that "the positive relationship between the extent of unionization of employees and negotiated wage rates exists specifically in the retail food industry," the industry in which petitioners are employed. Pet. App. 55a. That specific economic linkage, the Board explained, is established both by expert evidence and by evidence bearing on the actual experience of UFCW Locals 7 and 951 in collective bargaining with retail food industry employers. *Id.* at 55a-59a.[2]

The Board also took account of the findings and policies set forth by Congress in the text of the NLRA itself. Pet. App. 53a. For example, the Board noted Congress's finding that the inequality of bargaining power between employers and unorganized employees "prevent[s] the stabilization of competitive wage rates and working conditions within * * * industries." *Ibid.*

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[2] For example, the Board found that, in the Denver, Colorado supermarket industry, Local 7 was forced to accept wage reductions in negotiations with organized employers after a nonunion chain with significantly lower labor costs began operations in that market. After successfully organizing the nonunion competitor, however, Local 7 was able to negotiate wage increases from the unionized employers. Pet. App. 57a.

(quoting 29 U.S.C. 151). Such congressional findings and statements of policy, the Board concluded, evince Congress's understanding that "organization of multiple groups of employees, not just a single bargaining unit or the employees of a single employer in an industry, was necessary to achieve its goals of stabilizing wage rates and preventing depression of employees' wage rates and purchasing power." *Id.* at 54a.

Based on such considerations, the Board concluded that, under the NLRA, "organizing is both germane to a union's role as a collective-bargaining representative and can benefit all employees in a unit already represented by a union." Pet. App. 59a. Whether or not particular employees have chosen to be "members of the union that represents them," the Board explained, unions are "able to negotiate higher wages for the employees they represent when the employees of employers in the same competitive market are organized, and unions are less able to do so when they are not organized." *Ibid.* Accordingly, the Board concluded that a union may, consistent with the NLRA, charge objecting nonmembers for "their fair share of the union's organizing expenses" incurred in the competitive market. *Ibid.*[3]

4. Petitioners filed a petition for review of the Board's order. Initially, a panel of the court of appeals granted the petition for review. Pet. App. 31a-39a. An en banc panel of the court then reheard the case. The

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[3] A case currently pending before the Board presents the organizing-expenses issue raised in the instant case and related issues. See *Teamsters Local 75 (Schreiber Foods)*, No. 30-CB-3077, 2002 WL 1635454 (NLRB Dec. 12, 2001) (supplemental ALJ decision). Two of the three current members of the Board have not yet had an opportunity to express their views on the issue raised in the present case.

en banc panel unanimously denied the petition for review and enforced the Board's order. *Id.* at 1a-24a.

The court of appeals explained that, under *Beck*, the issue in this case is whether "the function of organizing other employers in a competitive market [is] germane to collective bargaining with the nonmembers' employer." Pet. App. 6a. Because "[t]he germane versus non-germane issue requires an informed assessment of the practical relationship between the challenged activity and the bargaining process," the court "d[id] not hesitate to defer to the Board's determination here." *Id.* at 11a. Noting petitioners' failure "substantially to contest the Board's actual factfinding in this case," the court of appeals concluded that the Board's judgment—that "for NLRA industries, organizing within the competitive market is germane to collective bargaining"—is reasonable, supported by substantial evidence, and "completely in accord with the economic realities of collective bargaining, as well as with the language and purposes of the NLRA." *Id.* at 12a-14a; see *id.* at 23a.

The court of appeals (as had the Board) rejected petitioners' contention that *Beck* and *Ellis* "foreclose[ ] the possibility that extra-bargaining unit organizing is germane to collective bargaining." Pet. App. 14a; see *id.* at 59a n.24, 60a-67a. Declining petitioners' invitation to "overread[]" this Court's decisions (*id.* at 22a), the court of appeals found it "clear" that, when the *Beck* Court described the respective union-security provisions of the RLA and the NLRA as being "statutory equivalents," the Court "did not intend that 'statutory equivalen[ce]' be applied at the level of specificity" urged by petitioners. *Id.* at 17a (bracketed material added by court of appeals). Rather, those provisions are equivalents in that each permits a union to require

nonmember objectors to pay for "only those expenditures that are germane to the collective bargaining function." *Ibid.* Because the Board reasonably determined that organizing within the competitive market is germane to the union's role as a collective bargaining representative, the court concluded that "[t]he result reached by the Board is not precluded by the language of *Beck*, but is fully consistent with it." *Id.* at 22a-23a.

The court explained that the holding of *Ellis* on the non-chargeability of organizing expenses rested on a "close review" of the particular legislative history of the RLA. Pet. App. 19a. The *Ellis* Court emphasized "the fact that the president of a major railway labor union specifically represented to Congress at the time of the enactment of § 2, Eleventh of the RLA that the union shop would have no effect on the bargaining power of unions covered by the [RLA], and that it would serve only to make those unions stronger generally." *Id.* at 14a-15a. Moreover, the RLA was "adopted in order to provide a labor relations structure for the railroad industry—an industry that was highly organized, and in which the process of collective bargaining was significantly different from that which exists under the NLRA." *Id.* at 19a.

ARGUMENT

In this case of first impression, the en banc court of appeals unanimously upheld the Board's determination that, under the NLRA, organizing the employees of employers in the competitive market is germane to a union's role as a collective bargaining representative. The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is therefore not warranted.

1. The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the work place is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 96 (1957). As this Court has explained, deference to the Board is particularly warranted "where Congress likely intended an understanding of labor relations to guide the [NLRA's] application." *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995). See *e.g.*, *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (a reasonable Board rule is entitled to "considerable deference" where the issue "implicates its expertise in labor relations"); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978). Accord *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (noting importance of Board's "detailed views" on questions relating to multi-employer bargaining) (citing *Buffalo Linen*, 353 U.S. at 96).

In this case, the Board found that "abundant" and "persuasive" empirical evidence, as well as the findings and policies set forth by Congress in the text of the NLRA itself, established that organizing other employers in the competitive market is germane to a union's role as an exclusive collective bargaining representative. Pet. App. 53a-59a. The empirical evidence demonstrated—both as a general matter and specifically with respect to the retail food industry in which petitioners are employed—that "[u]nions are able to negotiate higher wages for the employees they represent when the employees of employers in the same competitive market are organized." *Id.* at 59a; see *id.* at 13a, 54a-59a.

The court of appeals properly afforded deference to the Board's position in this case. As the court explained, the determination whether organizing is germane to collective bargaining is "a complex and difficult one for the layman, member of the judiciary or not," precisely because such a judgment requires "a sophisticated understanding of labor relations and the collective bargaining process" and "an informed assessment of the practical relationship between the challenged activity and the bargaining process." Pet. App. 11a, 18a. Having satisfied itself that the Board's holding in this case is reasonable and "completely in accord with the economic realities of collective bargaining," the court of appeals correctly deferred to the Board's view. *Id.* at 13a-14a.

2. In this Court, petitioners do not challenge the empirical evidence upon which the Board based its holding, nor do they contend that the Board's holding is inconsistent with the relevant findings and policies set forth by Congress in the NLRA. Rather, petitioners' principal contention before this Court is that the court of appeals should have afforded no deference to the Board's position because it is foreclosed by this Court's decisions in *Ellis* and *Beck*. See Pet. 9-20. Petitioners' contention, however, is based on an "overreading" of *Ellis* and *Beck*. Pet. App. 22a.

a. In *Ellis*, this Court did not address the question that was before the Board in this case, that is, whether organizing other employers *in the competitive market* may be regarded as germane to a union's role as a collective bargaining representative. Rather, the *Ellis* Court addressed "general organizing efforts," *i.e.*, activity that "strengthened the union as a whole and helped it to run more smoothly." 466 U.S. at 440-441. The court of appeals in *Ellis* had found that the

expenses of such generalized organizing were chargeable to the objectors in that case on the theory that "organizing efforts are aimed toward a stronger union, which in turn would be more successful at the bargaining table." *Id.* at 451. See Pet. App. 15a, 64a-65a.

Rejecting the court of appeals' reasoning, this Court held in *Ellis* that organizing expenses for the purpose of generally strengthening a union have an "attenuated connection with collective bargaining" that is insufficient to render such organizing expenses chargeable to nonmember objectors under the RLA. 461 U.S. at 451. That holding does not address, much less resolve, the question whether organizing aimed at the employees of employers in the same competitive market as the objector's employer is germane to collective bargaining. In addressing that different question in this case, the Board reasonably found, based on academic research, empirical data, and other specific evidence, that "there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market." Pet. App. 65a; see *id.* at 13a-14a.

Contrary to petitioners' contention (Pet. 11-15), the considerations that led the *Ellis* Court to reach its holding with respect to general organizing expenses are not dispositive in the different circumstances here. For example, the Court cited the legislative history of Section 2, Eleventh of the RLA. See 466 U.S. at 451-452. The Court emphasized that, although the court of appeals had found that "organizing expenses could be charged to objecting employees because organizing efforts are aimed toward a stronger union, which in turn would be more successful at the bargaining table," *id.* at 451, Congress had not authorized the union shop for that purpose. To the contrary, in testifying before

Congress in support of amending the RLA to provide for union security, the president of the Brotherhood of Railway, Airline, and Steamship Clerks "expressly disclaimed" that "the union shop was sought in order to strengthen the bargaining power of unions." *Id.* at 452. There is no comparable disclaimer in the legislative history of the NLRA.

The Court also noted that the legislative history of the RLA revealed no claim that the union shop was "necessary to hold or increase union membership." 466 U.S. at 452 (quoting *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 763 n.13 (1961)). That statement reflects the Court's earlier recognition that, when the RLA was amended to provide for union security, the "decisive" argument with Congress was that the railroad industry was already highly organized, and that union security was sought to more fairly spread the unusually high costs of administering the pre-existing collective bargaining machinery in that industry. See 367 U.S. at 761-762; see also Pet. App. 19a-21a.

By contrast, as the Board explained here, union security was "from the outset * * * an integral part" of the NLRA's statutory design "to promote organization" in industries that are typically "thinly organized." Pet. App. 63a-64a. Moreover, as the Board noted, while Congress restricted union-security agreements in 1947 to eliminate "the most serious abuses of compulsory unionism," at the same time it rejected a proposal that would have prohibited industry-wide bargaining. *Ibid.* (quoting *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 740 (1963)). Congress's rejection of that proposal "showed that the [NLRA's] objective of fostering organizing across employer lines remained intact." Pet. App. 64a; see *id.* at 12a-13a n.12.

Finally, the *Ellis* Court explained that "[a]ny free-rider problem here," *i.e.*, with respect to a union's "overall organizing efforts," is "roughly comparable to that resulting from union contributions to pro-labor political candidates," which "only in the most distant way works to the benefit of those already paying dues." 466 U.S. at 452-453. The Court's drawing of an analogy between the type of organizing expenses before it and political contributions having only an attenuated and indirect effect on particular bargaining units confirms that the Court was not addressing the issue decided by the Board here. As shown, that issue is the distinct and far narrower question of whether organizing expenses are chargeable to objectors where it can be empirically demonstrated that "there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market." Pet. App. 65a.[4]

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[4] Petitioners contend (Pet. 14) that the Board's rule in this case is inconsistent with the *Ellis* Court's statement that it would be "perverse" to read the RLA's union-security provision "as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." See 466 U.S. at 452 n.13. The Court in *Ellis*, however, made that statement with respect to organizing expenses that "were spent in part to recruit new union members *within the bargaining unit*." *Ibid.* (emphasis added). The "pervers[ity]" to which the Court referred was thus the oddity of requiring objecting nonmembers in an existing bargaining unit to pay the expenses of convincing them to change their minds. The Board's rule, however, does not address that situation. Instead, it addresses a union's effort to organize unrepresented workers *at other firms* in the competitive market. Unlike an objecting nonmember in an existing bargaining unit, an unorganized worker has not had occasion to decide whether—if a majority of his co-workers were to select union representation—he

b. Contrary to petitioners' contention (Pet. 14-16), *Beck* does not hold that, if a particular type of union expenditure (such as organizing expenses) is not chargeable to nonmember objectors for RLA purposes, then that expenditure is also not chargeable to objectors under the NLRA. Rather, as the court of appeals correctly found, the Court's holding in *Beck* does not operate at that "level of specificity." Pet. App. 17a. The court therefore properly declined petitioner's invitation "to extend, and thereby transform, the holding of *Beck* into a decision the Court did not make." *Id.* at 22a.

In *Beck*, this Court did not address whether any particular type of union expenditure is or is not properly chargeable to a nonmember objector under the NLRA. Rather, the *Beck* Court addressed the prior, and more general, question of the proper standard for making that chargeability determination. The Court concluded that NLRA Section 8(a)(3) and RLA Section 2, Eleventh are, textually speaking, "in all material respects identical," or "statutory equivalent[s]." 487 U.S. at 745-746 (quoting *Ellis*, 466 U.S. at 452 n.13). The Court therefore held that the chargeability test established in its RLA precedents—whether the union activity at issue is "germane to collective bargaining, contract administration, and grievance adjustment"—is likewise "controlling" under the NLRA. *Id.* at 745; see

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would choose nonmember objector status. Cf. *International Ass'n of Machinists* v. *Street*, 367 U.S. at 774 (explaining that "[t]he safeguards of [Section] 2, Eleventh were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee"). Nor, under the Board's rule, is that unorganized worker asked to pay the expenses of convincing him to join a union. Accordingly, the statement in *Ellis* on which petitioners rely is inapposite.

id. at 752, 753 n.8. As the court of appeals below correctly concluded (Pet. App. 22a-23a), the Board's decision in this case is fully consistent with *Beck*; the Board applied the general "germaneness" test, applicable in both the RLA and NLRA contexts, to the specific facts of this case, finding that organizing in the competitive market is "germane to a union's role as a collective-bargaining representative." *Id.* at 59a.

3. Nor are petitioners correct in contending (Pet. 21) that the court of appeals' decision in this case conflicts with the en banc decision of the Fourth Circuit in the *Beck* case. See *Beck* v. *Communication Workers of Am.*, 800 F.2d 1280 (1986) (per curiam), aff'd, 487 U.S. 735 (1988), cert. denied, 487 U.S. 1233 (1988). The en banc court in *Beck* did not address the issue first decided by the Board in this case and affirmed by the court below, *i.e.*, whether organizing activity in the competitive market is germane to the union's role as a collective bargaining representative. See 800 F.2d at 1281-1282. Rather, the principal issue before the en banc Fourth Circuit in *Beck* was whether the federal courts possessed jurisdiction over the objectors' claims. *Ibid.* The en banc court's only reference to expenditures was its statement, with no further discussion, that "[t]here was apparently no difference within the Court, assuming that federal jurisdiction was upheld, that the majority panel opinion's disposition of the allocation issue was properly resolved." *Id.* at 1282.

Like the en banc court, the panel in *Beck* also did not address whether organizing activity *in the competitive market* is germane to the union's role as a collective bargaining representative. See *Beck* v. *Communications Workers of Am.*, 776 F.2d 1187 (4th Cir. 1985), cert. denied, 487 U.S. 1233 (1988). There is therefore no reason to believe that, if presented with the question in

a future case, a panel of the Fourth Circuit would reject the Board's position in this case on the basis of the panel decision in *Beck*.[5]

4. Finally, petitioners contend (Pet. 23) that "[i]f the NLRA requires nonmembers to subsidize union organizing, the statute is unconstitutional as applied." That contention raises no issue warranting this Court's review. As this Court has explained, its precedents "make clear that expenses that are relevant or 'germane' to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991). Here, the Board, upheld by the court of appeals, reasonably concluded that organizing in the competitive market is germane to the union's role as a collective bargaining representative. See Pet. App. 13a-14a, 59a.

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[5] Petitioners assert (Pet. 22) that "the rule adopted *en banc* by the Ninth Circuit has been rejected by every federal and state court that has considered the issue." None of the cases cited by petitioners (Pet. 21-22), however, addresses whether solid empirical evidence demonstrates "a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market." Pet. App. 65a. See, *e.g.*, *Bromley* v. *Michigan Educ. Ass'n*, 82 F.3d 686, 696 (6th Cir. 1996) (Pet. 21) (addressing "defensive organizing" costs which serve solely the purpose of perpetuating the union's incumbent status as the representative of the bargaining unit), cert. denied, 519 U.S. 1055 (1997); *Albro* v. *Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.) (Pet. 22) (same), aff'd *sub nom. Ft. Wayne Education Ass'n* v. *Aldrich*, 594 N.E.2d 781 (Ind. 1992); *Cumero* v. *Public Employment Relations Bd.*, 778 P.2d 174, 191 (Cal. 1989) (Pet. 22) (addressing "possible relationship" between local public school salaries and those paid in other school districts).

Petitioners nonetheless suggest (Pet. 25-26) that, consistent with the First Amendment, they cannot be required to subsidize their union's organizing efforts because such activity is "ideological." That suggestion is unpersuasive. As the Board explained here, the cost of organizing employers in the same competitive market is fairly chargeable to nonmember objectors, because it is the means by which unions are "able to negotiate higher wages for the employees they represent," which includes the objectors. Pet. App. 59a. Organizing activity having such a straightforward economic purpose is not "ideological" in any relevant sense. Organizing for that economic purpose, moreover, is less "ideological" than is a union's conducting of periodic national conventions, or negotiating with employers over controversial issues relating to employment terms, both of which are established to be germane to a union's collective bargaining function. See *Ellis*, 466 U.S. at 448-449; *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).[6]

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[6] There is no merit to petitioners' suggestion (Pet. 23) that, absent this Court's intervention in this case, the Board's position will effectively become unreviewable. At least one case presenting the issue raised by this case is currently pending before the Board. See note 3, *supra*. Moreover, as the *Beck* litigation demonstrates, nonmember objectors may bring actions in federal court asserting that their union violates the duty of fair representation by charging them for organizational expenses incurred in the competitive market. That provides an additional mechanism by which courts would have occasion to address the legal issues presented by the Board's position here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP MULDER, LEON GIBBONS, CHARLES BUCK, GLENN HILTON, REBECCA MCREYNOLDS AND BARBARA KIPP,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PETITIONER

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national trade associations of businesses. They are filing this amicus brief because of their mutual concern that the decision of the Ninth Circuit conflicts with holdings of this Court and with other circuits on an issue of great public importance: whether a labor union may require objecting nonmembers as a condition of employment to pay compulsory dues for the purpose of financially supporting union organizing campaigns.

The National Association of Manufacturers – 18 million people who make things in America – is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

ABC is an association of more than 23,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms.

Many members of the Amici who are not presently unionized are targets of union organizing campaigns that are now being funded, in contravention of this Court's decisions in *Beck* and *Ellis*, by unlawfully compelled dues from objecting nonmembers of unions. At the same time, many members of the Amici who are already unionized now employ objecting nonmembers of labor unions, whose dues are being unlawfully compelled in support of union organizing, pursuant to the current policies of the National Labor Relations Board.

The Amici jointly believe that the legal issues under review are extremely important to employers and their employees throughout the nation. The decision of the Ninth

Circuit upholding the NLRB's ruling in this case ignores this Court's clear holdings and emasculates employee rights preserved under the National Labor Relations Act and the First Amendment.

ISSUES

The Amici hereby adopt and incorporate by reference the Petitioners' Questions Presented.

STATEMENT OF THE CASE

The Amici hereby adopt and incorporate by reference the Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

The Petition should be granted in order to redress a significant and direct conflict between the Ninth Circuit's decision and clear holdings of this Court in *Ellis v. BRAC* and *CWA v.Beck* and with the Fourth Circuit's holding in the *Beck* case. The Ninth Circuit's enforcement of the NLRB's Order compels objecting union nonmembers to pay dues in support of organizing efforts outside their own bargaining units, in direct contravention of established law.

The Ninth Circuit's reading of this Court's prior decisions cannot be supported. In large part, the Ninth Circuit's holding is based upon a rationale which was expressly considered and rejected by this Court in both *Ellis* and *Beck*. The Court must reaffirm these holdings now in order to preserve the rule of law.

The issue presented by this case is an important one, affecting the collection and expenditure of millions of dollars

and many thousands of employees. Absent review and reversal of the Ninth Circuit's holding, this Court's *Beck* decision, already severely challenged during the last decade, will be deprived of all meaning. The Petition should therefore be granted and the court of appeals should be reversed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW IN ORDER TO RESOLVE A DIRECT CONFLICT AMONG THE CIRCUITS AS TO THE CHARGEABILITY OF UNION ORGANIZING COSTS TO OBJECTING NONMEMBERS.

As the Petitioners have shown, the *en banc* Ninth Circuit decision in this case is the only decision of any state or federal court to require objecting nonmembers of a union to pay for union organizing elsewhere as a condition of employment. Pet. at 21. The Ninth Circuit's ruling thereby conflicts with this Court's plain holdings in *Ellis v. BRAC*, 466 U.S. 435 (1984), and *CWA v. Beck*, 487 U.S. 735 (1988). The Ninth Circuit's decision further conflicts directly with the decision of the Fourth Circuit interpreting the NLRA in *Beck v. CWA*, 776 F. 2d 1187, 1211-12 (1985), *aff'd en banc*, 800 F. 2d 1280, 1282 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988). Finally, the reasoning underlying the Ninth Circuit's *en banc* decision conflicts with the rationales set forth in every other federal or state court decision on the chargeability of union organizing costs since *Ellis*. *See Bromley v. Michigan Educ. Ass'n*, 82 F. 3d 686, 696 (6th Cir. 1996); *Lehnert v. Feris Faculty Assn*, 643 F. Supp. 1306, 1324-25 (W.D. Mich. 1986), *affd*, 881 F. 2d 1388 (6th Cir. 1989), *aff'd in part and rev'd in part on other grounds*, 500 U.S. 507 (1991); *see also Cumero v. Public Employment*

Rel'ns Bd., 262 Cal. Rptr. 46, 61-63, 778 P. 2d 174, 189-91 (Cal. 1989) and other cases cited by Petitioners. Pet. at 21-22.

This Court's review is required to resolve the direct conflict resulting from the Ninth Circuit's misreading of and departure from the above established precedent. In *Ellis*, this Court unanimously rejected the Ninth Circuit's identical claim that union organizing expenses should be chargeable to objecting nonmembers under the Railway Labor Act. The Court held that the connection between collective bargaining and the success of union organizing in other bargaining units was "attenuated," and that "such expenditures are outside Congress' authorization." *Ellis*, 466 U.S. at 451.

In *Beck*, this Court applied the principles of *Ellis* to the NLRA, reaffirming that Section 8(a)(3) of the NLRA and Section 2, Eleventh are "statutory equivalents." *Beck*, 487 U.S. at 762. Contrary to the Ninth Circuit, the *Beck* Court declared: "We think it clear that Congress intended the same language to have the same meaning in both statutes." Id. at 747.

The *Beck* Court ultimately affirmed a Fourth Circuit decision which addressed the precise issue decided here by the Ninth Circuit, with the opposite result. The original Fourth Circuit panel, relying on *Ellis*, held that organizing costs were nonchargeable under the NLRA. As the *en banc* decision of the Fourth Circuit in *Beck* unanimously found: "[A]ssuming that federal jurisdiction was upheld [as it was], that the majority panel opinion's disposition of the allocation issue was properly resolved." 800 F. 2d at 1282.

In the face of this compelling precedent, the misreading of this Court's decisions by the Ninth Circuit and the NLRB cannot be justified and must be reversed. The Ninth Circuit and the Board have asserted that questions regarding implementation of the *Beck* decision were left open by this

Court in *Beck* and that a different result from *Ellis* should be permitted because of the supposedly different legislative histories of the NLRA and the RLA. Pet. App. 14a-22a (Ninth Circuit); and 59a-67a (NLRB). According to the court of appeals, the fact that this Court has applied the two statutes differently in different contexts permits the NLRB to presume to chart its own course in the present case. Id.[2]

The Ninth Circuit's analysis ignores the fact that, as to the *present context*, the *Beck* decision clearly and conclusively forecloses the NLRB's attempt to interpret the NLRA differently from the RLA. As NLRB Member Brame stated in his dissenting opinion in this case:

> [T]he Court in *Ellis* found that under Section 2, Eleventh of the Railway Labor Act organizing expenses are not chargeable to objectors, and the Court in *Beck* found that Section 8(a)(3) of the National Labor Relations Act has the same meaning as Section 2, Eleventh of the Railway Labor Act. Taken together, these holdings compel the conclusion that under Section 8(a)(3) of the National Labor Relations Act organizing expenses are not chargeable, as such expenses are not chargeable under Section 2, Eleventh of the Railway Labor Act, whose meaning the Court has found to be the same as that of Section 8(a)(3). ...
>
> It is simply too late in the day to contend that a different interpretation is

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[2] The legerdemain necessary to reach the Ninth Circuit's conclusion is best summed up in the following quotation from the court's opinion, referring to this Court's mandate that the NLRA and the RLA be given the same meaning: "Giving the provisions this same general meaning, ... does not mean that they must be applied identically...." Pet. App. 20a.

> warranted based on Section 8(a)(3)'s legislative history. That argument is foreclosed by *Beck*'s holding that Section 8(a)(3) of the National Labor Relations Act has the same meaning as Section 2, Eleventh of the Railway Labor Act.

Pet. App. 87a-88a (Brame, dissenting).

It is also worth noting that, contrary to the Ninth Circuit, the legislative histories of the two statutes are not significantly different on the present issue, i.e., the relationship between union organizing outside a bargaining unit and a union security clause compelling dues within that unit. In enacting both statutes, Congress envisioned that union organizing would take place.[3] In neither case, however, did Congress see fit to compel any employees in one bargaining unit to support organizing in another. Neither the NLRB nor the Ninth Circuit cites any legislative history stating or even implying such a distinction.

In both *Ellis* and *Beck*, this Court found that Congress's intent under the RLA and the NLRA was identical: to prevent "free riders" from benefiting from union representational activities in their own places of employment. *Ellis*, 466 U.S. at 452; *Beck*, 487 U.S. at 746-54.[4] Just as nonmembers could not be compelled to support outside union political activities which could have been thought to have

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[3] Compare Sec. 2, Fourth of the RLA ("Employees shall have the right to organize and bargain collectively through representatives of their own choosing.") with Sec. 7 of the NLRA ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing.").

[4] "[T]he free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Non-bargaining unit organizing is not directed at that employee." *Ellis*, 466 U.S. at 452.

some "strengthening" effect on the union as a whole, so the Court held that nonmembers could not be compelled to support outside union organizing activities.

By attempting to manufacture a distinction between the RLA and the NLRA in the present case, the NLRB and the court of appeals have ultimately repeated the same discredited historical arguments which the union made to this Court in *Beck*, and which this Court correctly rejected. The present Petition must be granted in order to maintain the consistency of this Court's precedent in the face of such a direct challenge.

II. THE ISSUE OF WHETHER OBJECTING NONMEMBERS OF UNIONS CAN BE FORCED TO PAY DUES TO SUPPORT UNION ORGANIZING CAMPAIGNS IS OF GREAT PUBLIC IMPORTANCE.

The NLRB's Order in this case, as enforced by the Ninth Circuit, threatens to undermine the carefully balanced law permitting and restricting the uses of compulsory union dues, as established by this Court in *Ellis* and *Beck*. Full implementation of the Court's holdings has already been severely challenged due to problems of notification to employees and inconsistent enforcement by the NLRB over the last decade. *See Note, What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001).[5] Allowing the NLRB and the Ninth Circuit in the present case to ignore this Court's holdings altogether would cause irrevocable damage to the rule of law and would

[5] "This Note determines that the *Beck* system, as it exists, makes it nearly impossible for average employees to successfully assert the rights granted by the Court. By deciding cases in each of these different areas in a piecemeal fashion, the courts and the Board have hamstrung the process as a whole." *Id.* at 1050.

jeopardize the protections owed to objecting nonmembers of unions.

The Ninth Circuit's decision to affirm the NLRB, if left in place, could affect millions of dollars in compelled contributions. During his first two years in office alone, AFL-CIO President John Sweeney added $30 million to the union's organizing fund, all derived from dues payments, most of which are compelled.[6] Delegates to a recent AFL-CIO convention unanimously passed a resolution calling on unions to devote 30 percent of their budgets to organizing. President Sweeney said "many unions already are on track to meet or exceed the 30 percent commitment." "Union Organizing: AFL-CIO Convention Recommits Labor," *Daily Labor Report* (BNA)(Dec. 11, 2001).

Notwithstanding the findings of the NLRB in this case, the benefits of such expenditures to objecting nonmembers remain utterly attenuated. The record before the Board was devoid of facts or analysis to establish that organizing expenditures charged to the nonmembers actually produced any benefits for these employees. Instead, the Board relied on anecdotal evidence and disputed wage statistics that failed to establish any cause and effect relationship between union organizing outside a particular bargaining unit and the benefits of union representation within that unit.

The NLRB and Ninth Circuit decisions here ignore such factors as levels of unemployment in various markets, the size of organized employers relative to the total labor market serving the organized employers, the elasticity of demand for the end products, availability and cost of labor saving devices, and the elasticities of other productive factors. See Pet. App. 89a-90a (Brame, dissenting). *See also*,

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[6] "AFL-CIO to Continue Focus on Organizing," 154 Lab. Rel. Rep. (BNA) 82 (Jan. 27, 1997).

Lewis, Unionism and Relative Wages in the United States: An Empirical Inquiry (1963) and Union Relative Wage Effects: A Survey (1986)(finding that relative wage gains among union employees are related more to fluctuations in the general economy than to union bargaining).

Thus, nothing has changed which justifies the NLRB's unauthorized attempt to rewrite this Court's decisions in *Ellis* and *Beck*. The Board and the Ninth Circuit must not be permitted to evade and undermine this Court's holdings, to the detriment of objecting nonmembers who want no part of the union's organizing efforts outside their own bargaining units.

Conclusion

For the reasons set forth in the Petition and in the foregoing brief, the Amici ask that the Petition be granted and the Ninth Circuit decision be reviewed and set aside.

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No. 01-1867

In The
Supreme Court of the United States

PHILLIP MULDER, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOUNTAIN STATES LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

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13 pp

MOUNTAIN STATES LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

COMES NOW, Mountain States Legal Foundation ("MSLF") and hereby respectfully moves, pursuant to Supreme Court Rule 37, for leave to the file the accompanying *amicus curiae* brief in support of Petitioners. The Solicitor General of the United States has given his consent to this *amicus* brief. Petitioners have likewise granted consent to MSLF for the filing of this *amicus* brief. However, while waiving its right to file a brief, United Food and Commerical Workers Local 1036, has nevertheless denied consent.

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system. Since its inception in 1977, MSLF has been a leader in the battle to preserve the rights guaranteed to persons by the U.S. Constitution. Most recently, MSLF won the landmark equal protection case: *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995). Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded freedom of speech, religion, and assembly. For example, MSLF was a party in *Mountain States Legal Foundation v. Colorado*, 946 P.2d 586 (Col. App. 1997), and counsel in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000). MSLF believes that its expertise on the guarantees of the Constitution regarding First Amendment freedoms will assist this Court.

Although this is a case rooted in labor law, constitutional protections of free assembly (or association), ignored for much of the previous century in relation to that area of law, remain vitally important, are at stake in this case, and warrant protection by this Court.

WHEREFORE, MSLF respectfully moves for leave to participate in this case as *amicus curiae* and to file the accompany *amicus curiae* brief.

DATED this 25th day of September, 2002.

Respectfully submitted by:

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER[1]

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioners, Phillip Mulder, *et al.*

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded freedom of speech, religion, and assembly. For example, MSLF was a party in *Mountain States Legal Foundation v. Colorado*, 946 P.2d 586 (Col. App. 1997), and counsel in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000). MSLF believes that its expertise on the guarantees of the Constitution regarding First Amendment freedoms will assist this Court.

Although this is a case rooted in labor law, constitutional protections of free assembly (or association), ignored for much of the previous century in relation to that area of

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

law, remain vitally important, are at stake in this case, and warrant protection by this Court.

REASON FOR GRANTING *CERTIORARI*

The Court should grant *certiorari* to protect an important, albeit small, remnant of the First Amendment protection afforded the fundamental freedom of association as it relates to the National Labor Relations Act and to protect conclusively its holdings in *CWA v. Beck*, 487 U.S. 735 (1988), and *Ellis v. Brac*, 466 U.S. 435 (1984), namely, that union organizing costs are not chargeable to objecting non-members. The Court should also grant *certiorari* to preserve the principle that federal administrative agencies serve at the behest of Congress and are not free to "duck, bob, and weave" to avoid unanimous Supreme Court interpretations of congressional Acts.

THE FIRST AMENDMENT PROHIBITS USE OF COMPULSORY UNION DUES FOR UNION ORGANIZING

In 1779, Thomas Jefferson wrote, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[2] Jefferson's notion is protected in the language of the First Amendment to the U.S. Constitution; that is, "Congress shall make no law . . . abridging . . . the right of

[2] Thomas Jefferson, Statute of Religious Freedom (1779).

people peaceably to assemble,"[3] which, of course, includes the "[f]reedom not to associate."[4]

A. The History of Unionization Moved Government's Role From One Unconstitutional and Untenable Extreme to Another and Also Provides a Framework For Considering the Case at Bar.

An examination of the history of unionization provides not only a useful framework for the Court's analysis in this case but a classic example of government replacing one untenable and unconstitutional position with another, not an altogether uncommon occurrence amidst an activist political climate rather than one in which the government is restrained to its proper role of merely guaranteeing a system of negative rights.[5]

As Nelles writes in *The First American Labor Case*, 41 Yale L.J. 165 (1931) (discussing *Commonwealth v. Pullis*, Philadelphia Mayor's Court (1806)), the typical governmental response to those attempting to form employee associations was the filing of criminal conspiracy charges. However, just as individuals have the right to pursue happiness through voluntary exchange (freedom of contract, *inter alia*), so too do laborers have the right to enter agreements between themselves to secure said happiness

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[3] U.S. Const. amend. I.

[4] *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

[5] *See generally*, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW, RANDY E. BARNETT (Oxford: Clarendon Press 1998).

jointly. For governments to punish members of such associations with criminal conspiracy sanctions clearly violates the First Amendment right of assembly and the entire notion of freedom of contract. To hold those so doing as criminal conspirators is the philosophical equivalent of incarcerating those capitalists pooling their justly acquired money to invest in capital goods for which none of the individual investors could, absent this pooling, obtain such a good.

However, in creating the National Labor Relations Board (NLRB) through the National Labor Relations Act (NLRA),[6] rather than merely restoring itself to the proper governmental role – that is, enforcing the "negative" right of non-interference with employees' ability to be free of criminal sanctions in their attempts to strengthen their bargaining power by doing so as a unit – the NLRA instead fostered a regime under which "positive" rights were granted to members of the collective, more "rights," in fact, than any individual laborers held *ex ante*. In other words, special "group" rights were bestowed upon individuals simply based on their status as members of a labor union. The positive right or "duty to bargain,"[7] irrespective of a business owner's interest or willingness in so doing, provides an adequate example. This "duty" to bargain could be likened to a group of supermarket customers who, unhappy with the price of ketchup and simply because of their status as an organized consumer group, could forcibly require the grocer to associate (*i.e.*, sit and negotiate)

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[6] National Labor Relations Act, 29 U.S.C. § 151.

[7] National Labor Relations Act, 29 U.S.C. § 158(d).

over the price of ketchup rather than to spend his productive time doing what grocers otherwise would do. Fortunately for the grocery store owner, at least with respect to his customers, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

Although this case is about grocery store employees and "their" unions, it is decidedly not about ketchup or the NLRA-imposed duty to bargain. It is, however, about the illegitimacy of at least one of the positive group rights "bestowed" by the NLRA and the abrogation of certain employee's negative rights not to associate. Analysis of the present issue within the context of government's proper role as guarantor of negative rights would at least provide the Court with a philosophical sense of direction as it attempts to answer the narrower question presented by this case. The Court should avoid the temptation to move further in the wrong direction and impose a duty on those objecting non-members who, because of some prior illegitimate interference by government through the NLRA, find themselves lacking of constitutionally guaranteed protections.

B. The NLRB Has Ignored This Court's Rulings on This Question.

The narrower question before this Court is whether union organizing activities are chargeable to objecting non-members whose fundamental constitutional rights of non-association have been denied them based on some employee election in an NLRA-sanctioned voting scheme.

The imposition of any monetary charges upon those subject to the deprivation of their constitutional rights

rests upon the flawed notion that absent the mandatory payment of dues, "[N]onmembers receive . . . benefits of the Union's representation without making any financial contribution to its cost." *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. 292, 294 (1985). In *Chicago Teachers*, the union attempts to justify the imposition of dues as "an attempt to solve this 'free rider' problem." *Id.* Of course, even this justification is based on the flawed assumption that objecting non-members (who may well be of exemplary merit or character) would be unable to negotiate a better compensation package for themselves than that the union negotiates for its average laborer. Thus, in addition to being denied this right to pursue happiness free of governmental interference (freedom of contract, *inter alia*), they must now associate with, by paying, the very organization that, with the assistance of the NLRB, has been complicit with government in denying this fundamental right.

But here, while constitutionally and fully justified in arguing to protect the entirety of the objecting non-member's involuntary "contributions," Petitioners seek only to protect that fraction of the "contribution" that the union would use for activity related to recruiting activities. On the question of whether the union has a legitimate claim to this portion of the objecting non-member's "contribution," this Court has resoundingly answered that question in the negative in both *CWA v. Beck,* 487 U.S. 735, 745-46 (1988), and *Ellis v. Brac*, 466 U.S. 435, 451-53 (1984). Yet, the NLRB apparently has engaged in "selective hearing" on this point.

Indeed, the NLRB argues that recruiting new union members increases the union's service to the non-union member on whose behalf it claims to be negotiating and,

thus, this objecting non-member should be forced to pay. Even if the union's argument were true, the Petitioners' First Amendment right not to associate should defeat the union's claim on the objecting non-member's hard-earned wages.

But again, the pro-union argument fails to acknowledge that the objecting non-member sees union representation, even in its role simply as a contract negotiator, as an economic evil. If the objecting non-member believed he was well-served by the union, he would contribute to it willingly. The objector's subjective and perfectly rational view may well be that he could negotiate a more lucrative employment agreement for himself because of his individual merit or simply one more suitable to his own individual needs (*i.e.*, reduced hours, better health insurance, and so forth), irrespective of the total outlay by the employer for salary and benefits. Unfortunately, this objector is instead denied his right to pursue his individual best interest and his right to free association because of some majority union-selection election fostered under the NLRA.

Even if, *arguendo*, some benefit to the objector could be found, it is impossible to separate a union's recruiting activities from its political activities because, at a minimum, more members result in more contributions that may be used ultimately for political ends. Thus, even if an increase in membership raises wages, the increase in wages may not offset the negative effects, for that objecting non-member, of the increased union political activity with which he or she most vehemently condemns. To the

extent that this is not the case, the objector is free to contribute to these activities voluntarily.

CONCLUSION

Given the controlling authority of *CWA v. Beck* and *Ellis v. Brac* and the indistinguishability between union-enhancing political actions and other union power enhancing efforts and given the illegitimacy of those positive and group "rights" granted by passage of the NLRA in the first place, the Court must, at a minimum, grant *certiorari* to limit forced union "contributions" to those strictly attributable to the costs of bargaining undertaken by the union in the particular objecting non-member's interest and, at the same time, to question seriously the very legitimacy of forcing an objector to associate against his will and to pay for a negotiating service in which he has no genuine interest in participating.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PHILLIP MULDER, GLENN HILTON, CHARLES BUCK, LEON GIBBONS, REBECCA MCREYNOLDS and BARBARA KIPP,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the N th Circuit

PETITIONERS' REPLY BRIEF

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IN THE
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PHILLIP MULDER, LEON GIBBONS, CHARLES BUCK, GLENN HILTON, REBECCA McREYNOLDS and BARBARA KIPP,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

THE OPPONENTS NEITHER DISPUTE THE IMPORTANCE OF THE ISSUE PRESENTED NOR JUSTIFY THE REFUSAL OF THE NLRB AND *EN BANC* NINTH CIRCUIT TO FOLLOW *ELLIS* AND *BECK*.

A) The issue and its importance. "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *accord Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992). This Court's decisions in *Ellis v. BRAC*, 466 U.S. 435 (1984), and

CWA v. Beck, 487 U.S. 735 (1988), thus constitute an authoritative construction of the Railway Labor Act ("RLA") and National Labor Relations Act ("NLRA") concerning the issue presented: whether objecting nonmembers paying compulsory dues can be forced to subsidize any union organizing activities.

To avoid the clear meaning of *Ellis* and *Beck* and the "statutory equivalen[ce]" of the sections of the RLA and NLRA that authorize compulsory dues, *Beck*, 487 U.S. at 762, the NLRB's Brief in Opposition ("NLRB Opp.") at 10-16 contorts the two statutes and this Court's precedents interpreting them, as does the union's Brief in Opposition ("UFCW Opp.") at 5-11.[1] The original Ninth Circuit panel recognized the flaws in this approach, holding that "the Board does not have a free hand to interpret a statute when the Supreme Court has already interpreted the statute," and "does not have the power to reverse the Supreme Court." App. E at 35a-37a.

The NLRB's Brief admits that this Court has "held that the chargeability test established in its RLA precedents—whether the union activity at issue is 'germane to collective bargaining,

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[1] The NLRB purports to rely upon *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). NLRB Opp. at 16; App. F at 52a n.19. However, the NLRB applies only the first part of *Lehnert's* three-part chargeability test, "germaneness." The Board ignores the other two parts, *i.e.*, that the expenses involved must serve the government's interest in labor peace and not significantly add to the burden on nonmembers' free speech interests. *Lehnert*, 500 U.S. at 519. Courts have held that charging nonmembers for organizing can never meet the latter two prongs of the *Lehnert* test. *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673 (Ind. App. 1992), *aff'd sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992); *Browne v. Wisconsin Employment Rel. Comm'n*, 485 N.W.2d 376, 388-89 (Wis. 1992). Indeed, *Ellis* effectively held that organizing cannot meet *Lehnert*'s third prong when it recognized that any "free-rider problem" in the organizing context "is roughly comparable to that resulting from union contributions to pro-labor political candidates." 466 U.S. at 453.

contract administration, and grievance adjustment'—is . . . 'controlling' under the NLRA." NLRB Opp. at 14; *see also Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1113 (7th Cir. 1996) ("The germaneness guidance offered by the Court in *Ellis* has also been applied in private sector NLRA cases."). Yet the NLRB, with the blessing of the *en banc* Ninth Circuit, persists in misapplying and undermining the application of that test to organizing expenditures under the NLRA.

But, while the opposition briefs resist the application of *Ellis* and *Beck* to this case, they do not dispute the importance or timeliness of the issue presented. Nor can they. Indeed, when asking for rehearing *en banc*, the NLRB argued that "the case involves a question of exceptional importance: namely, whether the NLRA prohibits a union from charging objecting non-members . . . the cost of organizing employees of their employer's competitors." NLRB Petition for Rehearing *en banc* at 1, *UFCW Local 1036 v. NLRB*, 265 F.3d 1079 (9th Cir. 2001).[2]

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[2] The NLRB's Brief in Opposition at 6 n.3 implies that a writ need not be granted now, because there exists "[a] case currently pending before the Board present[ing] the organizing-expenses issue," and "[t]wo of the three current members of the Board have not yet had an opportunity to express their views on the issue . . . ." This is not grounds to deny the Petition.

First, the NLRB has on several occasions faced this or analogous issues, and has divided in every case. *See Teamsters Local 443 (Connecticut Limousine Serv.)*, 324 N.L.R.B. 633, 638 (1997) (Chairman Gould, dissenting) (accusing his colleagues of "manufactur[ing] a distinction in applicable law where none exists"); *Teamsters Local 75 (Schreiber Foods)*, 329 N.L.R.B. 28, 39-40 (1999) (Member Brame, dissenting); *California Saw & Knife Works*, 320 N.L.R.B. 224, 226 n.19, 239 n.78 (1995) (Member Cohen, dissenting); *Meijer, Inc.*, 329 N.L.R.B. 730, 744-46 (1999) (App. F. at 84-90) (Member Brame, dissenting). The Board does not need additional opportunities to belabor an issue that already was decided in *Ellis* and *Beck*.

Second, by arguing that the decision of the *en banc* Ninth Circuit is "correct," NLRB Opp. at 8, the two current NLRB members already have

(continued...)

The importance and timeliness of the issue also is demonstrated by events. A recent AFL-CIO convention unanimously passed a resolution calling on constituent unions to devote 30% of their budgets to organizing. AFL-CIO President Sweeney said "many unions already are on track to meet or exceed the 30 percent commitment." *Union Organizing: AFL-CIO Convention Recommits Labor*, Daily Lab. Rep. (BNA) (Dec. 11, 2001); *see AFL-CIO to Hold National Organizing Summit Next Year*, Daily Lab. Rep. (BNA) (Aug. 8, 2002); NAM & ABC Amicus Curiae Brief in Support of Petitioners at 8-10.

Nor do the briefs in opposition dispute the fact that this Court has already issued a writ, albeit under a different (but "equivalent") statute, on the precise issue presented here. *Ellis*, 466 U.S. at 441, 452 n.13 (1984); *see also Beck*, 487 U.S. at 741-42, 762 (granting "certiorari to resolve the important question"). This Court issued the writ in *Ellis* because it recognized that forcing nonmembers to pay for union organizing is an important matter touching on both federal labor policy and employees' rights of free speech and association. Having issued a writ under the RLA in *Ellis*, it is even more compelling that a writ be issued in a case arising under the NLRA, "its statutory equivalent," *Beck*, 487 U.S. at 762, which covers millions more employees.

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[2](...continued)
expressed their views. Nor has the NLRB asked that *this* case be remanded for reconsideration by those two members.

Third, unlike the other case pending before the Board, the present case contains "'abundant evidence' developed in the administrative record," NLRB Opp. at 4-5. Thus, this case is a better vehicle for the Board to defend its view that *Ellis* and *Beck* can be distinguished based upon the "'persuasive' record evidence" allegedly present here, *id.*

B) The opponents misstate the record in *Ellis* and this Court's holding, in their efforts to distinguish the issue presented. In calling this a "case of first impression," NLRB Opp. at 8; *see* UFCW Opp. at 2, the NLRB and the UFCW unions misstate the record and holding in *Ellis*.

The NLRB claims that *Ellis*' holding was limited to "general" organizing efforts, while the issue here is whether the NLRB "may craft a narrower rule that permits objecting nonmembers . . . to be charged for organizing efforts directed at employers in the same competitive market." NLRB Opp. at 3. This sophistic argument ignores that the allegedly "narrow" issue of organizing within the "competitive" industry was addressed in *Ellis* at every level, leading this Court to hold that ***all*** organizing—"general" and in the competitive industry—is nonchargeable. 466 U.S. at 451-53.

In *Ellis*, the union charged nonmembers for organizing and recruiting new members ***both*** inside and outside Western Airlines' competitive markets. The organizing efforts that the nonmembers challenged in *Ellis* were directed to:

> (a) employees [in the air transportation industry but] not employed by Western Airlines; (b) employees not employed in the air transportation industry; (c) employees not employed in other transportation industries.

Ellis v. BRAC, 91 L.R.R.M. (BNA) 2339, 2342, 1976 WL 1479, at *4 (S.D. Cal. 1976). The district court ruled that none of these expenditures was chargeable. *Id.* at 2343, 1976 WL 1479, at *5, *incorporated*, 108 L.R.R.M. (BNA) 2648, 1980 WL 2071 (S.D. Cal. 1980).

In reversing, the Ninth Circuit specifically found that BRAC's efforts to organize "***an*** industry" [*i.e.*, the competitive air transportation industry in which Western Airlines operated]

benefits employees and units already organized." *Ellis v. BRAC*, 685 F.2d 1065, 1074 (9th Cir. 1982) (emphasis added).

When *Ellis* reached this Court, BRAC relied upon the expert testimony of Lloyd Ulman, a noted labor economist, and Willard Wirtz, a former Secretary of Labor, to argue that organizing ***within the competitive industry*** was necessary to protect the already-organized workers.

> Former Secretary of Labor Willard Wirtz emphasized: . . . Organization is necessary also to protect the organized workers against the loss of work by subcontracting to unorganized employers [*i.e.*, competitors for the same work] . . . and against the loss of representation rights if their employer is taken over by a larger unorganized employer, as occurred with devastating consequences to BRAC members when the organized Capitol Airlines were merged into United Airlines.

BRAC Brief at 39-40, *Ellis*, S. Ct. No. 82-1150 (citing Wirtz's and Ulman's testimony), *reprinted in* BNA's Law Reprints, Lab. L. Series, Vol. 17, No. 9, 1983/84 Term at 205. Obviously, Western, Capitol, and United Airlines were in the same competitive market, yet *Ellis* found organizing of Western's competitors to be too "attenuated" from collective bargaining at Western to be chargeable to nonmembers. 466 U.S. at 451.[3]

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[3] UFCW Opp. at 10 misrepresents the history of the RLA and *Ellis* by claiming that *Ellis* declared organizing under the RLA nonchargeable solely because railroad union executive George Harrison "expressly disclaimed" that the union shop was needed to strengthen unions' organizing power, *Ellis*, 466 U.S. at 451 & n.12. This ignores that *Ellis* arose in the fledgling and sparsely organized air transportation industry, ***not*** the century-old and 85% unionized railroad industry. Thus, the highly unionized state of the nation's railroads was not the determinative factor in this Court's decision that all union organizing—even that conducted by BRAC at Western

(continued...)

That *Ellis* banned forced subsidization of all union organizing is corroborated by *Ellis*' explicit ruling that objecting nonmembers cannot even be charged for efforts "to recruit new union members within the bargaining unit." 466 U.S. at 452 n.13. This holding cannot be distinguished by speculating that "an unorganized worker has not had occasion to decide whether . . . he would choose nonmember objector status," NLRB Opp. at 13 n.4. A worker in an unorganized firm may well already have chosen nonmembership by voting against the union in an unsuccessful certification election. Moreover, new employees coming into an objector's unit also have not yet had occasion to decide whether to join or not, yet the union's costs of attempting to recruit them are nonchargeable under *Ellis*.

In short, this case raises the same issue that *Ellis* squarely and definitively decided. The *Ellis* Court's single use of the term "general organizing efforts," 466 U.S. at 440, on which the NLRB relies, NLRB Opp. at 3, was merely a short-hand phrase introducing the case. *Ellis*' holding, that ***all*** organizing has too attenuated a connection to the collective bargaining activities for which objecting nonmembers may be charged, *id.* at 451-53, encompasses the organizing at issue here.

C) The Circuit split is substantial. The opponents' attempt to deny a split between the *en banc* Fourth and Ninth Circuits, (NLRB Opp. at 15; UFCW Opp. at 6 n.2), is disingen-

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[3](...continued)
Airlines' competitors in the sparsely unionized airline industry—was "outside Congress' authorization," *id*, at 451. Rather, the critical factors were those that apply in ***any*** industry: that "[u]sing dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer," and that "[n]on-bargaining unit organizing is not directed at" "the employee the union [is] required to represent and from whom it [can]not withhold benefits." *Id.* at 452.

uous. *Compare Beck v. CWA*, 776 F.2d 1187, 1211-12 (1985), *aff'd en banc*, 800 F.2d 1280, 1282 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988) *with* App. A.

The Fourth Circuit panel in *Beck* noted that organizing was "the only specifically disallowed class of expenditures which CWA claimed to be erroneous in its exceptions to the special master's report." Then, based on *Ellis*, which it quoted at length, the panel held, "[w]e . . . affirm the decision of the district court in approving the special master's disallowance of CWA's expenditures under . . . four classifications . . ." including "'organizing,'" because those four categories are not chargeable as a matter of law. 776 F.2d at 1211. The NLRB's brief conveniently and tellingly fails even to cite the page of the *Beck* panel opinion on which this holding appears.

When the Fourth Circuit *en banc* reheard *Beck*, the *per curium* opinion stated that there was "no difference within the Court, assuming that federal jurisdiction was upheld, that the majority panel opinion's disposition of the allocation issue was properly resolved." 800 F.2d at 1282. Thus, the *en banc* Fourth Circuit clearly decided the organizing issue, and held *Ellis* binding under the NLRA, by adopting the majority panel's decision on this issue.

The real difference in the rulings of the *en banc* Fourth and Ninth Circuits is that the former chose to follow *Ellis*, whereas the latter refused, audaciously asserting that to do so would be an "overreading" of this Court's cases. App. A at 22a.

D) The NLRB is owed no deference on this issue, which has significant constitutional implications. The opposition pleads for deference to the NLRB's divided decision. NLRB Opp. at 9; UFCW Opp. at 1-4. No deference is owed where, as here, this Court has already authoritatively construed the statutory provision at issue. *Lechmere, Inc. v. NLRB*, 502 U.S.

527, 536-37 (1992); *see* pp. 1-2 *supra*. Moreover, last term the NLRB twice asked this Court for deference, but was rebuffed for another reason that applies here. *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275 (2002); *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390 (2002).[4]

In *Hoffman Plastic*, this Court applied the principle that it has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." 122 S. Ct. at 1280. In *BE & K*, the Court also gave the NLRB no deference, because of "the principle that we would not 'lightly impute to Congress an intent to invade . . . freedoms' protected by the Bill of Rights." 122 S. Ct. at 2396 (quoting *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961)); *cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Board's construction of the statute, as applied in this case, poses serious questions . . . under the First Amendment"). These principles, all but ignored by the *en banc* Ninth Circuit and the briefs in opposition, also govern here, because the Board's ruling trenches on First Amendment interests.

Union "organizing" activities, and refraining from those activities, are protected by the First Amendment's guarantees of free speech and association: "The right . . . to discuss, and inform people concerning, the advantages ***and disadvantages*** of unions and joining them is protected not only as part of free

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[4] The NLRB repeats the *en banc* Ninth Circuit's erroneous observation that Petitioners failed "'substantially to contest the Board's actual factfinding.'" NLRB Opp. at 7 (quoting App. A at 12a). The Nonmembers did challenge the factual underpinnings of the NLRB's ruling, relying in part on the expert testimony of Texas A&M Professor Morgan O. Reynolds that the relationship between the level of unionization and wage rates is "weak and tenuous." *See* Petitioners' Brief to the Ninth Cir. at 50-60.

speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (emphasis added); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-35 (1977) (First Amendment equally protects right to refrain from unionization).

Given the free speech and association interests in refraining from organizing activity, it is clear why *Ellis* found organizing costs to be "outside Congress' authorization": because any "free-rider problem" in this context "is roughly comparable to that resulting from union contributions to pro-labor political candidates." 466 U.S. at 451, 453. To rule otherwise would have meant that Congress ***intended*** RLA § 2, Eleventh to invade nonmembers' rights of free speech and association, by forcing them to subsidize an ideological message (unionism in general and a specific union's in particular) that they deplore. *See United States v. United Foods*, 533 U.S. 405 (2001) (agricultural producers cannot be compelled to fund even generic, non-ideological messages). Thus, grave constitutional questions are raised by the NLRB's ruling that objecting nonmembers can be compelled to subsidize union organizing and recruitment efforts. No deference is due the Board in these circumstances.

CONCLUSION

The Petition should be granted, and the decision below summarily reversed; or the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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